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SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. 361

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MEYER ABRAMS,
Attorney for Petitioner.

SHULMAN, SHULMAN AND ABRAMS,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and Associate Justices Of The Supreme Court Of The United States:

Petitioner, Oscar Pofe, petitions for the issuance of a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit which affirmed the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissing his suit and entering a Summary Judgment for respondent on its counterclaim.

A STATEMENT OF THE MATTER INVOLVED.

Petitioner, Oscar Pofe, a general agent of respondent, The Continental Insurance Company of New York, sued for $12,365.56 which he claimed to be due him under an agreement whereby respondent was to pay him the same rate that it was paying to its other "general" agents. He received $40,124.42 in commission during the five year period ending September 1, 1940 upon the representation that this was the rate it was paying to its other general agents, which representation was false and fraudulent, as it paid its other general agents 10% in excess of the rate which it paid him, and under such rate he would have been entitled to $52,489.98 up to that period, upon the mutual running account and, therefore, he sued for the $12,365.56 difference, and excluded other matters under the special agreement subsequent to that date.

The answer of the respondent denied that it ever made the agreement, but did not deny that it did not make the representations. In its counterclaim it asserted that there was due it from the petitioner $2654.74 for matters that occurred subsequent to September 1, 1940, which liability petitioner conceded and reduced by payment to $2400.00.

Respondent moved below for a judgment under Rule 12 (c) based on the pleadings and under Rule 56, based on extrinsic evidence to dismiss the action and for a judgment on the counterclaim. Petitioner opposed the motions and filed a counter-affidavit setting forth therein that his claim which exceeded the counterclaim was for matters which were embraced under the agreement which was in force up to September 1st, 1940 and while he admitted the liability on the counterclaim the respondent was still indebted to him the amount sued for in excess of respondent's counterclaim.

The Trial Court dismissed the suit of the petitioner, and entered judgment on the counterclaim for $2400.00, without indicating whether the judgment was entered on the pleadings or on the summary judgment which was based on extrinsic evidence.

The Court of Appeals affirmed the judgment below and denied a rehearing on the ground that the admissions of the liability on the counterclaim eliminated petitioner's action.

THE QUESTIONS PRESENTED.

The following questions are presented in this Petition:

1. Whether the judgment dismissing the action for a sum in excess of the counterclaim and entering the judgment on the counterclaim was proper under Rules 12 (c), 15 (b), 54 and 56.

2. Whether it is proper to enter judgment under alternative motions based on Rule 12(c) and Rule 56, without disposing of one of the alternatives, and without indicating whether the judgment was under Rule 12(c) or Rule 56.

3. Whether the admission of the liability on the counterclaim extinguished the claim in petitioner's suit which exceeded the counterclaim so as not to leave any genuine issues of fact to be tried, notwithstanding the existence of issues of facts as made up by the pleadings.

4. Whether the counterclaim was compulsory and if so, whether an admission of an indebtedness on such a counterclaim operates *ipso facto* to extinguish the suit in excess of the counterclaim.

5. Whether the facts alleged in the opposition affidavit to the summary judgment were at variance with the pleadings, and even if so, whether it was the duty of the court to consider the pleading as amended under Rule 15(b) and not to render final judgment.

REASONS FOR GRANTING OF WRIT.

1. The Petition presents important questions of procedure requiring an interpretation of the Federal Rules of Civil Procedure. The question whether an admission of liability on a counterclaim extinguishes the action of the plaintiff which exceeds the counterclaim, particularly where the action excluded the matters embraced in the counterclaim, as to authorize a dismissal of the action and and the entry of judgment on the counterclaim on alternative motions under Rules 12 and 56, deserves the consideration of this Court and the exercise of its discretionary power to grant the Writ.

2. The decision that where a party presents alternative motions under Rules 12(c) and 56 that judgment may be rendered without deciding on which of the two alternatives the judgment is based, leaving the aggrieved party in the dark on what the judgment is based and placing the burden on him to argue in the reviewing Court both motions, is an unreasonable construction of the new Federal Rules and in the interest of due administration it is necessary to have an expression of this Court on this important matter in Federal procedure.

3. The affirmance of the judgment of the District Court on the ground that the facts stated in the opposition affidavit which would have otherwise not justified the summary judgment was "a belated attempt to overcome the effects of the admission" in the "pleading", was based on a misconception of the aim, purpose, and scope of summary judgments. Neither the trial Court nor the reviewing Court may disregard the facts because of alleged variance with pleadings. Its decision is not only in conflict with decisions of other circuits, but is also in conflict with its own decision, and the Writ should be granted to harmonize the decisions.

4. The questions presented by this Petition were never passed upon by this Court and the Writ should be issued in order to harmonize the conflicting views of the Courts and to settle important questions of procedure under the new Federal Rules.

SPECIFICATIONS OF ERRORS RELIED ON FOR REVERSAL.

1. The admission of the indebtedness on the counterclaim which was less than the amount claimed by the plaintiff, did not warrant the entry of the judgment dismissing plaintiff's action and entering judgment for the respondent on its counterclaim. It was the duty of the court to permit the plaintiff to try his cause of action and to deduct from the amount established by the plaintiff the amount admitted to be due on the counterclaim, and the entry of the judgments dismissing plaintiff's action and granting a summary judgment on the counterclaim was clearly erroneous as a matter of law.

2. The motion for judgments on the pleadings admitted every fact pleaded in plaintiff's complaint and the falsity of denials in defendant's Answer, and, therefore, the court erred in entering judgment on the pleadings.

3. The entry of the judgment dismissing plaintiff's complaint and granting a judgment on the counterclaim was clearly erroneous in view of the opposition affidavit filed by the plaintiff and in view of defendant's admissions of the truth of the allegations by its motions.

4. The court of Appeals clearly erred in affirming the judgment under Rule 12(c) and 56 and it was its duty to reverse the judgment rendered and to direct a trial on the merits.

PRAYER FOR RELIEF.

Wherefore, Petitioner prays that this Court grant a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to the end that its judgment be reversed with directions to reverse the judgments of the District Court of the United States for the Northern District of Illinois, Eastern Division, and that the cause proceed to trial on the merits.

Oscar Pofe, Petitioner,
MEYER ABRAMS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No.

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit sustaining the judgment below was rendered on June 4, 1947, and the rehearing was denied on June 30, 1947. The petition is, therefore, filed timely, and the jurisdiction of this Court is invoked under Judicial Code, Section 240(a), 28 U. S. C. A., Section 347 (a) as amended by the act of February 13, 1925.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R-48-53) is officially reported (161 F. (a) 912).

STATEMENT OF THE CASE.

The Pleadings.

The original suit was filed in the Municipal Court of Chicago on December 13, 1943 and was removed by the respondent to the Federal Court on July 20, 1944 and after the removal, petitioner filed his Amended Complaint at law.

The Complaint:

After alleging the jurisdictional requirements (R 3; ¶1) the complaint alleged (R. 3; ¶2) that plaintiff entered into a written agreement with the defendant on December 31, 1927 by the terms of which the defendant agreed to pay plaintiff commission for his services rendered pursuant to the terms of said contract at "the same rate at which defendant was paying its other general agents." On October 22, 1937 the terms of the contract were modified by a written agreement (R. 3; ¶3). This agreement contained modifications of the original agreement, except as to the payment of the commission, stating in paragraph 1: "Agent has full power * * * to retain out of premiums so collected, as full compensation on business so placed with the company, commissions at the following rates, viz.: As now or may be in the future mutually agreed upon". Plaintiff acted as the "general agent" under the contract (R. 4; ¶4) and performed his services until September 1st, 1940. He was paid by the defendant (¶ 6) certain commissions upon the fraudulent representation of the defendant that the rates of commission upon which it paid him were the rates which it was paying its other general agents (R. 4; ¶7), and shortly prior to the filing of the complaint he ascertained that the defendant was paying its other general agents 10% additional com-

mission, and (¶ 8) by reason thereof, there was due to him $12,365.56 for the additional 10%.

The complaint alleged (R. 4; ¶4) that this contract was in force until September 1, 1940 and did not relate to transactions performed "thereafter". Plaintiff only received as a result of the concealment of the real rate $40,124.42, while there was really due him $52,489.98 upon the mutual running account up to September 1, 1940 (R. 5; ¶8) and there was due him $12,365.56 (R. 5; ¶9).

The Answer:

The Answer denied (R. 8; ¶ 2) that plaintiff was the general agent, and asserted that he was only one of its agents. It denied that there was any agreement to pay the plaintiff the rates it was paying other general agents. It admitted, however, (R. 9; ¶4) that subsequent to the termination of the agency of the plaintiff on September 1, 1940 plaintiff continued to act as defendant's agent as to "automobile" and "inland marine" insurance. The Answer was silent on the question whether or not the other general agents received the 10% above the amount that was paid to the plaintiff.

The Counterclaim:

Defendant's counterclaim alleged (R. 12) that during the employment of plaintiff he procured a large number of insurance policies and made monthly current statements from which he deducted his commissions; that (R. 13) the current statements attached as exhibits to the counterclaim show that there was due it from the plaintiff for the period from January, 1942 to May 27, 1946, $2,654.72. The accounts appear in the two exhibits attached to the counter-

claim, one of the exhibits being dated May 27, 1946 wherein plaintiff wrote to the defendant that he was enclosing a check for $100 and there was a balance due it of $2,654.72 (R. 17).

The Reply:

Counter-defendant's reply to the counterclaim (R. 17) denied that after September 3, 1940, when his agency terminated, he represented the company only as to inland marine and automobile insurance, but alleges that he retained a large number of class 2 agents, on which policies counter-defendant was paid an over-riding commission of 10% plus 10% contingent commision, and that such policies covered all lines of insurance which cleared through plaintiff's office. He admitted the indebtedness on the counterclaim of $2,654.72.

The Motions:

The defendant and counterclaimant moved for judgments on the "pleadings" and for "summary judgments" (Tr. 18). The ground for these motions was that it appeared from the Complaint that plaintiff's claim was based on commissions relating to the insurance business; that the counterclaim alleged that there was due on the counterclaim $2,654.72, which was admitted to be due by the counter-defendant; that it appears from an affidavit (R. 21) that this $2,654.72 was reduced by payment of $254.72 and that on August 20, 1946 there was due to the counterclaimant the sum of $2,400.

The Opposition:

The plaintiff filed an affidavit which by error stated it was in "support" of the motion for the judgments, but

which was in fact an affidavit in *opposition* thereto. In this affidavit the plaintiff alleges (R. 26) that the defendant and counterclaimant agreed to pay him a sum and rate equal to and as high as any of its other agents of the same class as the plaintiff; that when he received his commissions, he presumed that the rates paid to the other agents were the same as the rate which he deducted from the commissions and which he received from the defendant; that based upon this assumption, and before he knew of the fact that different rates were paid, he recognized a balance due to the defendant on the basis of the established rate; that at the date when he recognized the liability on the balance in 1942, he executed a deed conveying certain property as security for the purpose of securing the balance due to the defendant and counterplaintiff; that the defendant thereafter refused to release this property until he paid the balance of the indebtedness which he previously recognized; that the plaintiff thereafter reduced the balance in the amount stated by payments which were made during, and subsequent, to the filing of the suit and not prior thereto.

The Judgment:

While the defendant and counterclaimant prayed judgments on the "pleadings" under Rule 12(c) and in the alternative, "summary judgments" supported by affidavits under Rule 56, the court entered a judgment (R. 27) dismissing plaintiff's cause of action and entering a judgment on the counterclaim in the amount of $2,400 without indicating whether it was under Rule 12(c) or Rule 56.

The Affirmance:

The Court of Appeals affirmed the judgment below (R. 48) on the ground that the counterclaim was "compulsory" and the admission of the liability on the counterclaim extinguished petitioner's claim which was in excess of the counterclaim. It sustained the judgment, notwithstanding the fact that a genuine issue was raised by petitioner's affidavit, on the theory that the issues of fact raised by his opposition affidavit were in conflict with his "pleading", and the court denied rehearing.

ARGUMENT.

I.

When a suit exceeds the amount of the counterclaim the court is without power to dismiss the suit and enter judgment on the counterclaim, and it is its duty to permit a trial on the merits and to deduct the amount due on the counterclaim from the amount due plaintiff.

Assuming *arguendo* that it was proper to enter judgment on a motion for a judgment on the pleading under Rule 12(c) and for a summary judgment on extrinsic evidence under Rule 56, without indicating the foundation for the judgment and disposing of one of the two alternatives, it was nevertheless improper to enter the judgment, and the decision affirming it is in conflict with decisions of other Circuits and is based on erroneous interpretations of the Federal Rules of Civil Procedure.

The foundation of the motions is based on a *false* conception that the admission by plaintiff that he was indebted $2,400 on the counterclaim constituted an admission that there was nothing due him. This is *clearly an error of law*. This question was squarely decided *adversely* in *Crompton* v. *Seaich*, 142 App. Div. 432. There, the court said (p. 433):

> "A counterclaim when *admitted* will *not* entitle the defendant to a judgment for the full amount thereof, *unless the plaintiff fails to establish his cause of* action, and he can only recover the excess over the plaintiff's recovery where the plaintiff succeeds as to any part of his claim. The plaintiff by omitting to reply to a counterclaim, only admits that every ma-

terial allegation constituting it 'shall, for the purposes of the action, be taken as true.' *The effect of that admission is that the amount so counterclaimed may be deducted from the plaintiff's claim,* but it by no means concedes that the defendant shall be entitled to the recovery of the entire sum, irrespective of the demand made by the complaint."

The decision is cited with approval in *Burgess* v. *Slaven,* 266 N. Y. S. 79, 81. To the same effect is the decision in *Moore* v. *Wright,* 4 Ill. App. 443, where the court said at page 449:

"On the trial below the plaintiff admitted that he was owing the defendant upon account, and the proof sufficiently establishes the amount due, and the court should have allowed the defendant his demand against the plaintiff, *to the extent it was established* by the evidence and *if the plaintiff failed to show a right of recovery upon his alleged cause of action,* the defendant should have had a judgment for the full amount of his counterclaims." (Emphasis ours.)

In 57 Corpus Juris, page 522, Section 189, the author says:

"A counterclaim, when admitted, will not entitle defendant to a judgment for the full amount thereof, *unless plaintiff fails to establish his cause of action,* and it has been held that he can only recover the excess over plaintiff's recovery where plaintiff succeeds as to some part of his claim * * *. Where defendant admitted plaintiff's claim, *a judgment awarding defendant the whole amount of his counterclaim, without deducting plaintiff's claim therefrom is erroneous.*" (Emphasis ours.)

The author cites many authorities sustaining this statement of the law, which is the *universal law.* The new Federal Rules did not change the law. The "notion" that the "counterclaim relief" must "defeat" the opponent's relief "never had currency in Federal procedure" and Rule

13(c) makes it clear that this is not the function of a counterclaim (*Abraham* v. *Selig*, 29 F. Supp. 59; *Parmalee* v. *Chicago Eye Shield Co.*, 157 F. (2d) 582, 587).

The opinion (161 F. (2) 912) states (R. 51) that it "might agree" with petitioner's contentions that there "were genuine issues of fact" were it not for his answer to the counterclaim which admitted the allegations that he rendered monthly accounts and that he owed $2,654, which admissions were (R. 52) "utterly incompatible" with the allegations of the "original complaint". The court *conceded* that even an "account stated" may *not* be "final" and is "open to correction" because of "mistakes or fraud," but "no attempt was made to impeach" here until "the filing of the affidavit in opposition to the motion for judgment" which was "after the closing of the pleadings" and it "assumed" that the affidavit "was a belated attempt to overcome the effect of the admissions of the answer to the counterclaim." It *overlooked* that the *alleged account stated* is based upon transactions which occurred subsequent to September 1, 1940, which transactions were *excluded* from the complaint, and only *prior* transactions were involved on the ground of *fraud.*

The exhibits that are attached to the counterclaim show that the balance of $2654.72 was made up (R. 14) of two items: (1) of $776.09, and (2) of $1978.63. The exhibit further shows (R. 16) that the item of $776.09 was based on debits from January 1942 to July 1942 and on credits (with the exception of an item of $2.86) commencing June, 1942 and ending November, 1942. The item of $1978.63 (R. 16) comprises debits and credits from January, 1942 to February, 1943. Plaintiff's suit *excluded* all of the items upon which the alleged accounting is based, which had no relation to the subject matter of the suit.

In his complaint the plaintiff stated that it *was based on matters which transpired until* September 1, 1940, and not on matters that transpired thereafter, *which did not relate to the cause of action* (R. 4; ¶4). The accounts upon which the action was based were (R. 5; ¶8) from January 1, 1935 to September 1, 1940, *and after deducting the credits and debits as of that date,* plaintiff claimed that there was due him under his cause of action $12,365.56. He stated in his complaint (R. 4; ¶7) that while the credits and debits were correct as to the items between January 1, 1935 to September 1, 1940, it was based on *concealment of material facts and fraud* and he based his complaint on fraud and he sued for 10% for the items covered by these transactions, *excluding the subsequent items.*

The Reply to the counterclaim denied that the transactions after September 1, 1940 involved the same matters that were covered by the complaint up to September 1, 1940 and specifically stated (R. 17) that the matters *prior* to September, 1940 involved *different* transactions from the ones involved *after* September, 1940 and admitted the correctness of the account for the *period not covered by the complaint.* The affidavit in opposition to the summary judgment was, therefore, *not* a "belated attempt to overcome the effects of the admissions", as the court erroneously "assumed", but coincided *with the theory of the complaint and with the admissions to the counterclaim.* And if there was a variance, it was the duty of the trial court and of the Court of Appeals *to treat the pleading amended* and not enter a final judgment, under Rule 15(b) and Rule 54 as construed by the Second Circuit (*Downy* v. *Palmer,* 114 F. (2) 116, 117) and the decision is squarely in conflict with that of the Second Circuit.

II.

The decision is in conflict with decisions of other Circuits.

The opinion 161 F. (2) 912 *concedes* (R. 51) that the facts as stated in the opposition affidavit would have constituted genuine issues of fact were it not for the alleged conflict with the "pleading" which admitted the liability on the counterclaim, and *held that the pleading was controlling.* This is in conflict with Rule 15(b) as construed by the same circuit in *Globe Liquor Co.* v. *Roman,* 160 F. (2) 800 where the court said (p. 802):

> "Of course, where on the trial evidence is admitted without objection which proves a case different from that alleged in the complaint, we may consider the pleading amended to conform to the evidence thus introduced."

And is also in conflict with the decision of the Second Circuit in *Rossiter* v. *Vogel,* 134 F. (2) 908, 912 that "where facts offered in affidavits upon motion for a summary judgment which would justify an amendment of the pleadings" *no summary judgment should be entered.*

Statements in opposition affidavits against the summary judgments must be treated in the same degree as if evidence were introduced at the trial without objections, and where there is a discrepancy between extrinsic evidence and the pleadings the *former must prevail* under Rule 54. This is particularly true in a case where there was no trial on the merits and where the person is deprived of his day in court (*Sprague* v. *Vogt,* 150 F. (2) 795). The rules for *summary judgments* were not adopted to entrap parties, and if a lawyer inadvertently made admissions in pleadings which perhaps he would not have made if he were more careful, and thereafter filed an affidavit in opposition to a motion for summary judgment, *the affidavit should be given effect and the pleadings considered*

amended, as this court held in the *Globe* case *supra*. It was the duty of the trial court, as well as the duty of the reviewing court, to consider the plaintiff's pleadings and his opposition statements in the most *favorable light* to him (*Ramsouer* v. *Midland Valley R. Co.*, 135 F. (2) 101, 105); and *resolve every doubt against the movant* (*Parmelee* v. *Chicago Eye Shield Co.*, 157 F. (2) 582) and even if there be discrepancies between pleadings and affidavits, it should not assume, as it did in this case, that the discrepancies were "*belated attempts to overcome the pleadings.*" Such presumption should *not* be indulged in support of a summary judgment against them.

The opinion refers to the authorities cited by the petitioner (R. 52, Note 1) and distinguished them on the ground that the counterclaims in those cases were based "on subject matter in no way related to that of the complaint". The Court overlooked that in the instant case the *counterclaim in no way related to the subject matter embraced in the complaint*. The complaint was based on transactions that occurred up to and including September 1, 1940 and expressly excluded subsequent matters which were not the foundation for the claim (R. 4, ¶4). The counterclaim was based on matters that transpired commencing with the year 1942 and which had no relation to plaintiff's claim under an agreement which expired September 1st, 1940. There was *no inconsistency* between the admission of the liability on the counterclaim and the amount claimed by the plaintiff in his claim. The "mutual account", *up to September* 1, 1940 was based on the representation of the respondent as to what were the rates it paid to other general agents during that period. *This mutual account was not disputed* by the petitioner but the claim was based on *fraud and misrepresentation* as to the payment under which he was entitled to 10% *addi-*

tional commission. This had nothing to do with the counterclaim which embraced matters that were not in dispute. It is obvious that the distinctions of the Court are inapplicable, and the decision is *clearly in conflict* with the decision in *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. (2) 582. It is also in conflict with the decision of the Sixth Circuit in *Rogers* v. *Guardian Trust Co.*, (Feb. 7, 1947) 159 F. (2) 239, 242.

III.

The motion for a judgment on the pleadings admitted the truth of every allegation of the complaint and the falsity of the denials in the answer.

It is elementary that a motion by a defendant for a judgment in his favor on the pleadings *admits the truth of every* factual allegation in the Complaint, and the denials of the facts in the answer cannot be considered (*Art Metal Construction Co.* v. *Lehigh*, 116 F. (2) 57). No extraneous matters may be considered on a motion for a judgment on the pleadings. The affidavit filed by the defendant in this case cannot be considered in connection with its motion for a *judgment on the pleadings* and the court may only look to the Complaint and *not* to the Answer (*Ream* v. *Callahan*, 42 F. Supp. 951; *Snowwhite* v. *Tidewater Oil Co.*, 40 F. Supp. 739; *Friedman* v. *Washburn Co.*, 145 F. (2) 751, C. C. A. 7).

The motion of the defendant for "judgment on the pleadings" admitted the *truth* of all of plaintiff's allegations and *conceded* the *falsity* of defendant's denials (*Wyman* v. *Wyman*, 109 F. (2) 473). We will, therefore, only discuss the cause of action as alleged in the Complaint, which facts are conceded to be true by the motion for the judgment on the pleadings.

The conceded facts are that defendant entered into an agreement with the plaintiff on December 31, 1927 by the terms of which plaintiff was to act as its "general" agent for all insurance business and agreed to pay him the same rate which it was paying to all of its other general agents (Tr. 3: ¶2). The contract was modified on October 22, 1937 as per written agreement attached to the Complaint, and plaintiff performed his services as defendant's general agent under the terms of the contract up to September 1, 1940, except as to certain other matters which remained in full force and effect thereafter (Tr. 4: ¶¶ 3, 4, and 5). Plaintiff was paid 25% of the gross premiums on "ordinary" business, 35% on "preferred" business and 10% of "accrued net profits" at the end of each calendar year. The defendant "fraudulently" and with "intent to deceive" the plaintiff, *wilfully misrepresented* to him that the aforesaid rates of commission, which he received, were the highest rates which defendant was paying to its general agents standing in the same agency relation as the plaintiff was, but in truth and in fact *the defendant was paying other agents an additional* 10% *commission*, which fact *first* became known to the plaintiff on or about June 1, 1943 and that plaintiff is entitled on the additional 10% for the period up to September 1, 1940 the sum of $12,356.56. This indebtedness constituted a part of a "mutual account" between the parties and the suit was brought within 5 years from the date when the said indebtedness became finally due and owing.

On the state of these admitted facts, there could be no judgment on the pleadings for the defendant. Having *admitted* that it made a contract and agreed to pay the plaintiff the same rate as it paid its other general agents and that when it paid the plaintiff his commission it *fraudulently concealed* from him that it paid other agents an additional 10% commission, that these facts were not

known to the plaintiff until June 1, 1943 and that the amount due him was $12,365.56, it follows that there could be no judgment on the pleadings for the defendant. In view of the admission of the liability to the plaintiff in excess of $12,000, there could be no judgment on the pleadings on the counterclaim for $2,400. All that the plaintiff was entitled to was to *deduct* the $2,400 which was admitted to be due it from the $12,365.56, the amount claimed by the plaintiff. The judgments on the pleadings dismissing plaintiff's cause of action and entering judgmest on the counterclaim *cannot be sustained on any theory* and should be reversed.

IV.

The motion for summary judgment was improperly sustained when it appeared that there were genuine issues of fact to be tried.

A movant is not entitled to a summary judgment unless the conceded facts show *beyond any doubt* that the plaintiff is not entitled to any relief (*McEllwain* v. *Wickwire Spencer Steel*, 126 F. (2) 210; *Miller* v. *Miller*, 122 F. (2) 209, 212). The court which decided this case in construing Rule 56 of the Federal Rules of Civil Procedure in (*Campana* v. *Harrison*, 135 F. (2) 334), said:

> "The purpose of Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following sections 723c was to enable the court to enter summary judgment when the pleadings and affidavits that may have been filed with the pleadings, clearly showed that there was no issue of fact to be tried. *The court in such proceedings is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings.* In the case at bar, the Corporation alleged in its complaint that it bore the burden of the tax and that its dealings with the Sales Com-

> pany were at arm's length. The Commissioner in his answer denied these allegations. This presented sharp, clear issues of fact. Affidavits were filed to prove and to disprove these issues of fact, and the court on these conflicting affidavits undertook to resolve the conflict. *This action of the court was not proper on the motion for summary judgment.* The affidavits did not demonstrate that there were no issues of fact; They demonstrated that there were decided issues of fact. The Commissioner could not be foreclosed on the right to a trial on those issues by the entry of summary judgment. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 3 Cir., 130 F. 2d 1016; *Heiberg* v. *Halser*, D. C., E. D. N. Y., 1 F. R. D. 735." (Emphasis ours.)

A summary judgment cannot be entered if there be any issue of fact sustaining the claim of the adversary (*Sartor* v. *Arkansas Natural Gas Co.*, 321 U. S. 620).

In *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. (2) 582 the court pointed out that a summary judgment cannot be entered where there are genuine issues of fact. The "burden" is on the "movant" to show an absence of issues of fact and *all doubt must be resolved against the movant.*

In *Doehler Metal Furniture Co.* v. *United States*, 149 F. (2) 130, the court said at page 135:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. *A litigant has a right to a trial where there is the slightest doubt as to the facts*, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. *Denial of a trial on disputed facts is worse than delay. Cf. Arenas* v. *United States*, 322 U. S. 419, 429,

433, 64 S. Ct. 1090, 88 L. Ed. 1363. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U. S. 620, 624, 64 S. Ct. 724, 88 L. Ed. 967, tells us that, especially where, as here, damages are in question, the courts should go slow about making haste by a summary judgment; there the Supreme Court said that 'at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party' "

See also *Rogers* v. *Guardian Trust Co.*, 159 F. 239.

We have already shown that Petitioner's claim is based on 10% commisison due him for services performed *up to September* 1, 1940, excluding services performed by him after that date (R. 4; ¶ 4). The "other dealings" between the plaintiff and the defendant, which were not embraced in the claim upon which the suit was predicated, appear from defendant's answer which *admits* (R. 9; ¶4) that plaintiff *continued* for a time after September 1, 1940 to act as agent of the defendant as to "automobile" and "inland marine" insurance. Plaintiff's claim was not based upon such service but on services performed *prior* to September 1, 1940.

It appears from the exhibits (R. 15, 16) that this was for *special services* performed between January, 1942 and February, 1943 and these items were *expressly excluded* from the Complaint, which was limited to September 1, 1940.

The affidavit of Earl B. Vickery states that plaintiff was appointed by the defendant as defendant's agent to procure insurance business for the defendant for "fire" and allied lines of insurance at rates of commission fixed by oral arrangements in accordance with the rules of the

Chicago Board of Underwriters and that the rates of commission were agreed upon between the plaintiff and defendant at 35% upon preferred risks, 30% upon intermediate risks, and 25% upon ordinary risks and that the credits and debits were computed according to such rates (R. 22, 23). He stated that according to the contract or agreement between them plaintiff was required to render defendant current monthly accounts and that plaintiff was entitled to a "term of credit" upon these accounts and that he became delinquent in remitting the balances so that on or about September 30, 1942 there was due from the plaintiff to the defendant in excess of $6,000, which account was later reduced to $2,400, and that the payments on account of these items were made by the plaintiff *subsequent* to the filing of the suit and during its pendency and that there is due to the counter-plaintiff on an account stated the item of $2,400 (R. 25).

Plaintiff filed a counter-affidavit which alleged that the agreement of the defendant was to pay him "a sum and rate equal to and as high as any of the other agents of the same class as the plaintiff." Plaintiff presumed that the rate that he had been receiving was the same rate that other agents received until he discovered the facts that higher rates were paid "as alleged in the Complaint." Before he became aware of these facts, he conveyed, in 1942, his real estate to the defendant as security for a balance due *figured on the rate which the plaintiff was being paid, without knowing then that he was entitled to a higher payment,* and that after he filed his lawsuit claiming the amount due him from the defendant, he was desirous to obtain the release of his property because of the enhanced market value of properties in the years 1945 and 1946 and the defendant insisted on the payment of the balance before it would release the

real estate, and that he, therefore, made the payment during the pendency of the suit in order to obtain the release of the real estate (R. 26, 27).

The following *genuine issues of fact appear* therefore, from the record: (1) whether the plaintiff was the general agent of the defendant as alleged in the complaint; (2) whether he was an ordinary agent as asserted in the answer; (3) whether plaintiff and defendant agreed that the plaintiff would receive the same rate as was being paid to the other general agents as asserted in the complaint (R. 3) and as denied in the answer (R. 8); (4) whether other general agents received higher rates as alleged in the complaint (R. 4) and on which the answer is silent which, according to the Federal Rules must be considered as an admission of the truth of the allegation; and (5) whether the payment was made upon the stated account as claimed by the defendant (R. 25) or whether it was paid on the account which was agreed upon *before* plaintiff discovered that there was due him in excess of $12,000 under his agreement by the concealment of the facts as alleged in his complaint (R. 10) which facts were adopted by the opposing affidavit (R. 26). Upon such a state of the record which shows *genuine issues of* fact it was *clearly erroneous* to grant the summary judgments.

There were conflicting statements in the complaint and the answers, as well as in the affidavit of defendant and in the affidavit of the plaintiff. *In such a case no summary judgment can be entered without at least findings of facts* (*Bauer* v. *Rose,* 149 F. (2) 612, 616). No such findings were made here. According to this court no summary judgment may be entered at all (*Campana* v. *Harrison,* 135 F. (2) 334, *supra*).

The sufficiency of the pleadings are not open to attack on a motion for a summary judgment. The affidavit in support of the judgment did not deny the allegations of fraud upon which petitioner's claims are founded, and even if it did, the affidavit could not have been considered as the motion admitted the truth of the allegations. (*Rogers* v. *Guardian Trust Co.*, 159 F. (2) 239, 241).

V.

Rule 12(c) and Rule 56 are mutually exclusive and a judgment cannot be entered on both motions without disposing of one of the motions. The entry of a summary judgment without indicating on which motion it is based, is improper under a reasonable construction of these rules.

Rule 12(c) is based on the "pleadings" while Rule 56 is based on "extrinsic evidence". There is no contention on the part of the petitioner that a party may not move alternately for a judgment under both rules. Our contention is that a reasonable construction of these rules would require the Court to *deny one of the motions* and to at least indicate the foundation for the judgment. A party is entitled to know the foundation for the judgment which is entered against him so that in the event of an appeal he need not grope in the dark and be compelled to devote his efforts in *discussing two motions* which are mutually exclusive, as the petitioner was compelled in this case. If the court had indicated that the judgment was based under Rule 56 then there would have been no need to burden the reviewing court and to devote time to a discussion of the motion under Rule 12 (c), and the same thing would be true if the court had indicated that the motion was based on the pleadings and not on the extrinsic evidence. The purposes of the rules was to simplify procedure and not to make it more

cumbersome. The purpose of a summary judgment is not to entrap the parties and if a person is not entitled to a judgment on the pleading or is entitled to a summary judgment on the extrinsic evidence, the proper judgment should be entered so that the aggrieved party may know what steps to take in the event of a review.

The opinion relies (R. 53) on the decision in *Palmer* v. *Palmer,* 31 F. Supp. 861. In a note on page 863 the court points out that there is "some difference" of opinion on the point whether the distinctions should be kept in mind. There is, however, no difference in opinion on the point that the judgment should point out whether it is based under Rule 12(c) or under Rule 56. At any rate, there is no ruling on this point by this court.

Conclusion.

The decision below is not in harmony with the decisions of other circuits, and is unsound. The petitioner was deprived of his day in court without the opportunity to try his claim on the merits. The writ should be granted to the end that the judgment below be reversed, and the law affecting procedure under the Federal Rules be clarified.

Respectfully submitted,

MEYER ABRAMS,
Attorney for Petitioner.

SHULMAN, SHULMAN and ABRAMS,
134 N. LaSalle St.,
Chicago, Ill.
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 361

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI, OBJECTIONS TO THE JURISDICTION OF THE COURT AND BRIEF IN SUPPORT.

HAYES MCKINNEY,
Attorney for Respondent.

C. OSCAR CARLSON,
MCKINNEY, FOLONIE & CARLSON,
105 W. Adams Street,
Chicago 3, Illinois,
Of Counsel.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NO. 361

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTION.

The defendant objects to the jurisdiction of this court on the ground that the petition for certiorari was filed herein on September 22, 1947; that such petition so filed was in the name and on behalf of a deceased person, in that said Oscar Pofe died the preceding day, namely September 21, 1947; that no action may be begun in the name of a deceased person; that the filing of a petition for certiorari is the commencement of a new suit, and accordingly Rule 19 of this court has no application, since it applies to "pend-

ing'' suits, and this suit was not ''pending'' at the time of the death of said Oscar Pofe; that the last day under Section 350 Title 28 U. S. C. A. for the filing of a petition for certiorari herein was September 30, 1947; that no petition in the name of the legal representatives of said Oscar Pofe was filed within the time allowed by law; that the court has now no jurisdiction either to entertain the present petition or to entertain a new petition for a writ of certiorari.

Objections to the jurisdiction of the court are accordingly filed pursuant to Rule 7, Paragraph 3, and included in the brief of this respondent in opposition to said petition for certiorari.

STATEMENT OF THE MATTER INVOLVED.

The factual situation as set forth in the petition for certiorari herein (on pp. 2-3 of the printed petition) and the statement of the case (as found on pp. 10-14 of the printed petition and supporting brief) do not adequately or correctly show the questions now being presented to this Court. The two aspects of the present problem are (1) the true factual situation as disclosed by the pleadings and (2) the legal questions which arise therefrom.

As to the factual situation disclosed by the pleadings and affidavits, we point out the following:

Complaint.

1. The amended complaint, which was sworn to, averred that a written contract had been entered into on December 31, 1927 between the parties whereby plaintiff was constituted a general agent for the defendant; that defendant agreed *in that written contract* to pay plaintiff commissions at the same rates which defendant was paying to other agents at the same time for like services in the same territory (Par. 2; R. 3); that plaintiff had neither the original nor a copy of the written agreement of December 31, 1927 as it had been surrendered when the later contract of October 22, 1937 was executed (Par. 5; R. 4); that on October 22, 1937 the then existing contract was *modified* and a new written contract was entered into. This new contract was identified as Exhibit A to the complaint and expressly incorporated therein by reference (Par. 3; R. 3-4).

2. *There is no averment in the complaint that the substituted agreement of October 22, 1937 contained a provision*

that defendant should pay plaintiff at the same rate of commission as to other agents; and an examination of that contract (Exhibit A) (R. 6-7) *shows that no such term or provision is contained therein.*

3. Exhibit A, being the supposedly substituted contract of October 22, 1937, contained a specific provision that that contract *rescinded all prior agreements.* This portion reads:

> "(6) This agreement supersedes all previous agreements, whether oral or written, between the Company and Agent * * *." (R. 7.)

And that written agreement provides, in relation to commissions to be allowed the agent thereunder, shall be at rates "as now or may be in the future mutually agreed upon." (R. 6.)

The amended complaint nowhere contains any allegation as to rates of commissions agreed upon under the new contract.

4. The sworn amended complaint averred that *"the indebtedness now remaining unpaid* and due plaintiff from defendant, to recover which this suit is brought, *constituted a part of a mutual account between the parties"* (Par. 9; R. 5). And in the Statement of the Case in plaintiff's petition for a writ of certiorari this account is designated as a *"running mutual account"* (p. 11 of petition).

5. It was also averred that plaintiff acted as defendant's agent and performed services until September 1, 1940 (Par. 4; R. 4).

6. The amended complaint averred that defendant fraudulently and with intent to deceive and defraud the plaintiff wilfully misrepresented that the rates of commission which were paid plaintiff were the highest rates defendant was paying to any of its other agents standing in the same agency relationship, in accordance with the

rules of the Chicago Board of Underwriters, but that, in fact, defendant paid other agents compensation exceeding by as much as 10% the commission rates paid plaintiff, knowledge of which fact first came to the plaintiff on or about June 1, 1943 (Par. 7, R. 4). These averments were not for the purpose of establishing an action of deceit (for insufficient averments were made) but to affect the operation of the Statute of Limitations (Par. 7; R. 4).

7. The amended complaint averred that commissions due and owing during the period from January 1, 1935 to September 1, 1940 amounted to $52,489.98; that defendant had paid thereon the sum of $40,124.42, and that there remained due as commissions and compensation for the business done during the period from December 31, 1927 to September 1, 1940 the sum of $12,365.56, which amount was claimed with interest from September 1, 1940 (Par. 8; R. 4-5).

Answer.

8. Defendant's amended answer denied the existence of a written contract of December 31, 1927 and specifically denied any such contract for the payment to plaintiff of commissions at the same rate as was being paid to other agents. The answer also set up that plaintiff was appointed defendant's agent on May 1, 1927 to procure insurance, but that no written contract was then entered into and that there was no written contract between the parties until the execution of the written agreement of October 22, 1937, being Exhibit A to the amended complaint (Par. 2; R. 8-9).

9. The amended answer admitted the execution of the agreement of October 22, 1937 (Par. 3; R. 9).

10. Defendant, while denying that plaintiff was a "general" agent, admitted that plaintiff acted as agent for

defendant under the terms of the October 22, 1937 agreement until September 1, 1940, and admitted that thereafter plaintiff continued to act as agent for defendant as to automobile insurance and inland marine insurance (Par. 4; R. 9).

11. Defendant denied the existence or surrender of the supposed written agreement of December 31, 1927 (Par. 5; R. 9).

12. Defendant denied plaintiff's averments as to fraud and misrepresentation and also denied that defendant paid other agents 10% higher commission rates than those paid plaintiff (Par. 7; R. 10). The statement (p. 11 of the petition for certiorari) that "the answer was silent on the question whether or not the other general agents received the 10% above the amount that was paid to the plaintiff" is untrue. The averment that other agents were paid such additional 10% is found in Par. 7 of the amended complaint (R. 4). The amended answer specifically denied all of the averments of such paragraph 7 (R. 10).

13. Defendant denied that there was $12,365.56 or any other sum due to plaintiff (Par. 7; R. 10).

Counterclaim.

14. Defendant counterclaimed that during the existence of the agency under the written contract of October 22, 1937 plaintiff issued a large number of policies of insurance and collected large sums as premiums and rendered monthly accounts current of the business so transacted (Par. 1-2; R. 12).

15. The counterclaim averred that each account current so rendered by plaintiff to defendant showed not only policies issued and the amount of premium under each policy but also "*the plaintiff's commissions thereon at*

rates fixed and agreed upon between plaintiff and defendant" (Par. 3; R. 13). (Averments admitted. See paragraph 20 hereof.)

16. Such accounts current also showed authorized agency expenses; premiums returned on cancellations and return commissions on cancelled policies, together with the "balance due and payable on such account" (Par. 3; R. 12-13). (Averments admitted. See paragraph 20 hereof.)

17. The counterclaim averred that plaintiff while rendering accounts current failed to remit amounts shown thereby to be due, the amount of the shortage being $2,654.72, and attached a statement showing the months in which the items accrued; also that no part of the $2,654.72 had been paid and was then due (Par. 4; R. 13). (Averments admitted. See paragraph 20 hereof.)

18. The counterclaim averred there was due from plaintiff to defendant on May 27, 1946 upon an account stated between them "upon such balances of premiums upon such accounts" the sum of $2,654.72, no part of which had been paid, but which had been acknowledged by plaintiff to be due by letter dated May 27, 1946, a copy of which was attached as Exhibit 2 and made a part of the counterclaim (Par. 5; R. 13-14). (Averments admitted. See paragraph 20 hereof.)

Reply.

19. Plaintiff replied to defendant's counterclaim admitting all of the averments of Par. 1 thereof except matters now immaterial (Par. 1; R. 17).

20. Plaintiff's reply also admitted the averments of Par. 2, 3, 4 and 5 of defendant's counterclaim, which are the averments hereinbefore referred to (in paragraphs 15, 16, 17 and 18 hereof) and admitted an indebtedness of $2,654.74 "*as alleged*" (Par. 2; R. 18).

Motions.

21. On motions made in the alternative under Rule 12 (c) and Rule 56 (R. 18-22), defendant presented the affidavit of Earl B. Vickery, Cook County Manager of the defendant, which affidavit among other things set out that an account was kept between plaintiff and defendant with reference to transactions of insurance by plaintiff as defendant's agent and which contained items of the following character:—credits to defendant for premiums collected by plaintiff from insureds; debits to defendant for commissions upon such premiums; debits to defendant for return premiums on cancelled policies; credits to defendant for return commissions applicable to such return premiums; debits to defendant for remittances by plaintiff of balances due from time to time; debits to defendant for postage allowance (R. 23).

22. The Vickery affidavit stated that the agency agreement (Exhibit A; R. 6-7) required plaintiff to render monthly accounts current for each calendar month's business (R. 24); that plaintiff became delinquent in remitting balances due upon accounts current so that on September 30, 1942 plaintiff owed defendant in excess of $6,000 but thereafter reduced said balance so that on May 27, 1946 the amount was $2,654.72 on which day plaintiff remitted $100.00 and wrote a letter saying the $100.00 was "in payment of premiums"; also saying "Balance due you $2,654.72". Thereafter on June 22, 1946 plaintiff remitted $54.72; on July 25, 1946 he remitted $100.00 and on August 20, 1946 remitted $100.00; each remittance was accompanied by a letter stating that it was "in payment of premiums" and also stating the balance remaining due after applying such payments, so that the last letter read "Balance due $2,400.00" (R. 24-25).

23. The Vickery affidavit stated that the account was

the same account already described and was the same account for the same transactions upon which plaintiff claimed an additional 10% of commissions (R. 25).

24. The Vickery affidavit also set out that the payments and letters of May 27, 1946, June 22, 1946, July 25, 1946 and August 20, 1946 were long after the commencement of the suit and with full knowledge by plaintiff that defendant denied it was indebted to plaintiff, and that as to the two payments and letters of July 25, 1946 and August 20, 1946 they were "after the filing of defendant's counterclaim and the filing of plaintiff's reply thereto" (R. 25).

25. Plaintiff's affidavit in opposition to the motions (though erroneously labeled as in support) set out that the defendant had always agreed to pay the sum and rate equal to and as high as paid to any other of defendant's agents of the same class (R. 26). This came after the motions had been made and the averment was not contained in any of plaintiff's pleading as to the contract sued on.

26. Plaintiff's opposing affidavit stated that he had recognized the balance due for premiums without knowledge of defendant's preference to other agents and that under insistence by defendant he had executed mortgage security for the debt, had requested release of the property so mortgaged but had been refused (R. 26-27).

27. Plaintiff's affidavit admitted that payments described in the Vickery affidavit "were made *as stated*"; that they were made during, but not before, the pendency of the suit and "for the foregoing reasons" (R. 27).

Judgment.

28. Upon the factual situation above set forth the District Court found that the plaintiff had admitted owing defendant $2,400.00 "under the same contract and upon the

same account and with respect to the same transactions upon which plaintiff seeks to recover" (R. 28). The District Court also found that $2,400.00 was due from plaintiff to defendant upon an account stated and accordingly rendered judgment that the plaintiff take nothing under his suit and that the defendant recover of the plaintiff the sum of $2,400.00 (R. 28).

29. Affirmance of the judgment of the District Court by the Circuit Court of Appeals for the Seventh Circuit followed the theory of the District Court that the admissions by the plaintiff that he had been paid commissions at rates fixed and agreed upon between the parties and that plaintiff was indebted to defendant upon a running mutual account between the parties, (which account covered transactions arising out of the contract sued upon) were conclusive of the situation. The essence of the Circuit Court of Appeals' decision was that there could be no obligation by defendant to plaintiff arising out of a long series of insurance transactions where the various items of debit and credit applicable to the transactions admittedly resulted in a debt from plaintiff to defendant. Accordingly the Circuit Court of Appeals held that there was no genuine issue of fact to be submitted to a jury.

30. The essential legal question upon which the Circuit Court of Appeals decided the case was that regardless of issues of fact upon immaterial matters, the applicable rule was (as contended for by defendant in that Court) that where some factual situation determinative of the legal rights of the parties was shown to exist by clear and indubitable facts or by admissions, a summary judgment was proper in accordance with the legal effect of such facts, in favor of that party whose rights were thus shown to predominate. And that where such a situation exists, there are no genuine issues of fact subject to trial.

QUESTIONS PRESENTED.

Petitioner states that five questions are presented by the petition for certiorari (page 4 of petition). It seems proper to note, with reference to these questions, the following:

1. This question, as stated, assumes and presupposes that the plaintiff's claim was a totally different and unrelated matter from the defendant's counterclaim; whereas, under the facts as hereinbefore set forth plaintiff's claim was for the purpose of surcharging, with a 10% additional commission, the transactions and items during a stated period, which were contained in a continuous, running, mutual account which eventually became an account stated in favor of the defendant and against plaintiff.

2. This question as stated in Paragraph 2 (on Page 4) as well as set out in the "reasons for the granting of a writ" (on Page 5) is now a moot question. The Approved Amendments of the Federal Rules of Civil Procedure, (which by the adjournment of Congress on July 26, 1947 become operative on October 26, 1947) cover completely the question whether, on motions for judgments on the pleadings and for summary judgments presented in the alternative, the District Court is required in reaching a conclusion to state upon which alternative it acted. In the past, the courts have approved action similar to that taken in this case, and in the future such action is authorized by the Amendments to Rule 12 (c). Accordingly, this court is not required, for future guidance of the courts and lawyers in handling this question, to go to former decisions of the courts, whether conflicting or not, but the course of proceeding and practice is clearly outlined by the Amendment to Rule 12. Moreover, it is funda-

mental that the correctness of the action of a District Court in deciding a case is tested, not by the reasons it may give for its actions, but by the soundness and validity of the action taken upon the record before it.

3. This question of petitioner covers ground similar to the foregoing No. 1 in that it fails to distinguish between an admission of liability on an entirely different claim set up by a counterclaim, as contrasted with admission of liability upon a counterclaim which is completely integrated into and a part of the same series of transactions for the same continuous, running, mutual account as that upon which plaintiff sues.

4. Whether a compulsory counterclaim decided in favor of a counterclaiming defendant will in all cases overcome the initial claim does not enter into this case where the claim and counterclaim are so completely parts of the same series of transactions that failure to counterclaim would have been fatal to any attempt at a later time to enforce the counterclaim if it had not been brought into the pending litigation.

5. This question seems excluded by the consideration that the facts alleged in the opposing affidavit were not at variance with admissions contained in the pleadings but were corroborative thereof. Nor does Rule 15(b) have any application to this case. That rule merely contemplates that on the actual trial of a case on issues outside the pleadings the case shall be treated as if tried on issues raised by the pleadings. While the Rule permits amendments to conform to the issues actually tried, even after judgment, and even a failure so to amend does not upset the judgment, the whole purport of Rule 15(b) is with reference to an actual trial before the court or a jury where evidence is presented on both sides of an issue, not actually before the court under the pleadings, but treated by the parties as if made an issue by formal pleadings.

OBJECTION TO JURISDICTION.

Now comes the respondent, by its counsel, and objects that the Court is without jurisdiction of the cause upon the following grounds, namely:

1. The petitioner, Oscar Pofe, died on September 21, 1947.

2. The petition for writ of certiorari was filed in this Court on September 22, 1947.

3. The Court is without jurisdiction to entertain a petition filed in the name of and on behalf of a deceased person.

4. Rule 19, paragraph 1, has no application. The writ of certiorari sought in this case was not "pending" at the time of the death of the petitioner, having later been filed.

5. Moreover, no effort has been made to initiate this proceeding or proceed therewith in the name of an administrator.

And in support of such objection to jurisdiction defendant files herein in this case simultaneously herewith (but under separate cover) a certified copy of Certificate of Death No. 28423 filed in the office of the Board of Health of the City of Chicago, Illinois, certified by the Registrar of Vital Statistics of the City of Chicago, as keeper of the records of death, such records being kept by virtue of the laws of the State of Illinois and ordinances of the City of Chicago, which certificate shows that said Oscar Pofe died on September 21, 1947.

Reproductions of said certified copy of death certificate are incorporated herein as a part of this objection to jurisdiction.

In accepting service of notice of the filing of this petition for certiorari, defendant by its present counsel, noted that it was "without prejudice from the fact of death of petitioner, Oscar Pofe, prior to the filing of said petition" (See filed notice of acceptance of service on September 25, 1947).

Citations of authorities in support of this objection will be found in the brief in opposition to the petition for allowance of a writ of certiorari under Point VI thereof.

HAYES MCKINNEY,
Attorney for Respondent.

CITY OF CHICAGO --- Board of Health

OFFICE OF THE PRESIDENT BOARD OF HEALTH

FILL IN THIS FORM (except signature)
WITH TYPEWRITER OR LEGIBLE PRINTING

ORIGINAL

STATE OF ILLINOIS — DEPARTMENT OF PUBLIC HEALTH — DIVISION OF VITAL STATISTICS

CERTIFICATE OF DEATH 28423

1. PLACE OF DEATH: County of Cook; Registration Dist. No. 316; City Chicago; Ward Chicago; Street and Number, No. ; (If death occurred in a hospital or institution, give its NAME instead of street and number.)

LENGTH OF TIME AT PLACE WHERE DEATH OCCURRED? yrs. 4 mos. — da.

2. PLACE OF RESIDENCE: STATE Illinois; County Cook; Township; City or Village Chicago; Street and Number 353 No. Clark St.; Ward; Inst. No.

2a. PRINT FULL NAME OSCAR POFE

2b. If veteran, name war No.

3. (a) Social Security No. None

4. Sex MALE

5. Color or race White

6. (a) Single, married, widowed, or divorced (write) Single

6. (b) Name of husband or wife —

6. (c) Age of husband or wife if living — years

7. Birth date of deceased (Month) Sept (Day) 6 (Year) 1886

8. AGE: Years 61 Months 0 Days 15 If less than one day hrs. — min.

9. Birthplace Unknown Germany (City, town, or county) (State or foreign country)

10. Usual occupation Insurance Agency

11. Industry or business Own business

FATHER 12. Name Unknown

13. Birthplace Germany (City, town, or county) (State or foreign country)

MOTHER 14. Maiden name Unknown

15. Birthplace Germany (City, town, or county) (State or foreign country)

16. INFORMANT Hospital Records (Mercy) (personal signature with name and title)

P. O. Address 811 E. 49th St

17. DISPOSITION: (a) Cemetery City; Location (Township, Ward Dist., Village or City) Freeport; County Stephenson; State Ill.; (b) DATE 9-25-47

18. Undertaker (Signature or Name) J. Brady; Address 1948 W. Ogden; License No. F-51

MEDICAL CERTIFICATE OF DEATH

19. Date of death: Month Sept. Day 21 Year 1947 Hour 11 o'clock PM

20. I hereby certify that I attended the deceased from May 31 '47 to Sept. 21 '47; that I last saw h[illegible] alive on Sept 21 '47; and that death occurred on the date and hour stated above.

Cause of death: Arteritis Mellitus — 14yr. — Duration

Due to —

Due to —

Other conditions contributing to death but not related to the principal cause given: Cerebral hemorrhage — 2 days

21. Was an operation performed? No — Date of —

For what disease or injury? —

Was there an autopsy? No —

Findings —

22. If a woman, was pregnancy within 3 months of death? No

Was death due to, or aggravated by, pregnancy or childbirth? No

Signature and Title of Physician: Edward P. Conyngham, M.D.

Address 842 E. 47th St.

Date 9-22-47

20a. Date signed 9-22-47

20b. Physician's Address 842 E. 47th St.

20c. Place of Death: Hospital, Institution, Residence, Other (specify) Hospital

20d. Duration of residence in city, town, or county of death: Years — Months — Days —

20e. Usual residence: Street and Number — City, town, or county — State —

21. Filed Sept 23 1947

P. O. Address 847 SEP 23 PM 3 0

STATE OF ILLINOIS } SS
COUNTY OF COOK
CITY OF CHICAGO

I, Herman N. Bundesen, M.D., Registrar of Vital Statistics of the City of Chicago, do hereby certify that I am the keeper of the records of births, stillbirths and deaths of the city of Chicago by virtue of the laws of the state of Illinois and the ordinances of the city of Chicago; that the foregoing is a true copy of a record kept by me in pursuance of said laws and ordinances.

Dated SEPT. 26, 1947

President of the Board of Health, Registrar

by Deputy Registrar

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NO. 361

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

With respect to the matter of jurisdiction we have already in the initial portion of the answer to the petition for certiorari raised the question as to the jurisdiction of this Court based on the death of the petitioner prior to the filing of the petition and have also by special objection to the jurisdiction raised the same question.

STATEMENT OF THE CASE.

In the opening portion of the answer to the petition for certiorari under the heading "Statement of the Matter Involved", we have set out the factual situation with sufficient fullness and we therefore refer to that portion of the answer, in support of which this brief is filed, for knowledge as to the factual situation now involved.

ARGUMENT.

I.

A.

Where Some Factual Situation Determinative of the Legal Rights of the Parties is shown to Exist By Clear and Indubitable Facts or By Admissions, a Summary Judgment Is Proper in Accordance With the Legal Effect of Such Facts, in Favor of That Party Whose Rights Are Thus Shown to Dominate, No Matter What Other Facts May Exist. And Where Such a Situation Exists There Are No Genuine Issues of Fact Subject to Trial.

In the light of the fact situation heretofore set forth the law is clearly established in favor of the proposition set out in this heading and in support of the action of the District Court in rendering judgments and of the Circuit Court of Appeals in affirming such judgments.

In *Fishman* v. *Teter,* 133 Fed. (2d) 222, decided in the Seventh Circuit, a summary judgment which had been allowed by the District Court was affirmed upon grounds that support the action of the District Court in this case. In that case the holder of bonds sued members of a bondholders' committee for damages alleged to have resulted from conspiracy of the committee and for other wrongful acts. The court stated the applicable rule to be as follows (Page 223):

> "The only question we are asked to decide is whether the judgment finds support in the pleadings and the affidavits attached to the motion for summary judgment.
>
> "In the consideration of the question, we agree

that the motion should be sustained only where there is no doubt as to *how some essential question should be resolved, such an essential question as that when it is resolved adversely to one of the parties, that party cannot prevail. Whiteman* v. *Federal Life Insurance Company,* D. C., 1 F. R. D. 95. In other words, it was for the court to determine, if the evidence contained in the affidavits was orally submitted to the court, whether the evidence justified submitting the case to the jury." (Emphasis ours.)

In the face of the contention of the plaintiff in that case that the complaint set forth a cause of action (which we submit the amended complaint in our case does not) and that the answers of the defendant raised triable issues of fact so that the court could not say there was no bona fide issue between the parties, the court examined the record in that case and reached the conclusion, upon the facts therein, that what the defendants had done as members of the committee constituted a complete defense to the charges made against them. This result was regardless of any immaterial issues which gave way to the dominating and determinative one.

Accordingly, this court held (page 224):

"Giving effect to the evidence contained in the affidavits, *it seems clear that there is no genuine issue as to any material fact* that could be submitted to a jury. We therefore conclude that the District Court did not err in sustaining the motion." (Emphasis ours.)

Applying the rule of law above set forth to the situation in this case, it will be seen that the existence of an account stated between the parties, upon which plaintiff is indebted to defendant, is an "essential question" and when resolved in favor of the defendant, as it must be upon this record, it is such a question as that when resolved adversely to the plaintiff, precludes the plaintiff

from prevailing in this case. The record is conclusive, by plaintiff's own allegations and admissions, that there was an account between plaintiff and defendant covering the transactions of insurance wherein plaintiff acted on behalf of defendant, and that upon such account, which was stated between the parties by the plaintiff's own action, there was nothing due from defendant to plaintiff, but, on the contrary, plaintiff was indebted to defendant.

The necessary and logical consequence is not only that plaintiff owed defendant $2,400 and that defendant is entitled to recover that amount, but also that defendant cannot owe plaintiff on plaintiff's amended complaint for the additional 10% commission. Accordingly both judgments awarded by the District Court were proper and required by the record.

In *Fisher* v. *Underwriters at Lloyd's London*, 131 Fed. (2d) 1016, the court in the Seventh Circuit examined a summary judgment in favor of the plaintiff where the issues between the parties had been narrowed down to the question, whether the plaintiff, who was a professional dancer, had, previously to the accident which disabled her, made contracts for appearances which, being unable to meet because of her accident, had caused the plaintiff loss. In examining a summary judgment entered by the District Court it was said (page 1017):

> "The entry of a summary judgment was justified in view of the fact that previous trials and appeals had *narrowed the issues to a single one of fact. That fact was established by affidavit (if proof there was) which were not controverted or opposed by any proffered proof on the part of the defendant.*
>
> "It was, therefore, we think, a clear case for final and prompt disposition." (Emphasis ours.)

So in our case the pleadings and the affidavits had narrowed the issues down to a single question: Was there

an account stated between the parties upon the items of the transactions had under the contract sued on and, if so, was the balance of that account in favor of the defendant? If that was the situation then the defendant was not only entitled to recover the amount owing to it from the plaintiff, but being the creditor and not the debtor, as between plaintiff and defendant, there could be nothing due to the plaintiff from the defendant, and judgment should be for the defendant on plaintiff's claim as well as on the counterclaim.

In *C. T. C. Investment Company* v. *London & Lancashire Indemnity Company*, 116 Fed. (2d) 741, also decided in the Seventh Circuit, a summary judgment was sustained. Plaintiff sued on a guaranty of payment of real estate bonds. The guaranty contained a provision that any note or coupon claimed upon should be surrendered uncancelled and be assigned to the guarantor. Plaintiff had sold the certificates of deposit and was unable to comply with this condition, in recognition of which facts the summary judgment was entered. After pointing out that plaintiff was obligated to tender the bonds and keep his tender good and might not sell them and still maintain a right of action on the guaranty, the court (at page 745) said:

> "The *pertinent facts in this respect, being undisputed on the pleadings*, it was a proper case for the exercise of the power to grant summary judgment under Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723 c". (Emphasis ours.)

The "pertinent" fact of non-tender made all other facts of no materiality.

In *Wilkinson* v. *Powell*, 149 Fed. (2d) 335, decided by the Circuit Court of Appeals for the Fifth Circuit, a railroad conductor sued the railroad for personal injuries. An affidavit in support of a motion for summary judgment showed that the injuries were received entirely outside

the scope of plaintiff's duties. It was there said (at page 337):

> "*We have found present no genuine issue as to a material fact* and the evidence reveals no negligence chargeable to appellees. Appellant's injuries were received through instrumentalities wholly foreign to his employment, and in a manner entirely disconnected therewith. Under such circumstances appellees were entitled to judgment as a matter of law." (Emphasis ours.)

The case just cited quoted from 3 Moore's Fed. Prac. p. 3174 and used the expression "pierce the pleadings" which we understand to mean to get to the heart of the controversy and to the undisputed facts which settle the question involved no matter how many collateral issues may be present.

While the fact situation in the case cited is materially different from the facts in the case at bar, nevertheless, the principle is the same that when there is some outstanding factual situation conclusive of the legal rights existing between the parties and that factual situation is clearly and unequivocally shown to favor one of the parties as a matter of law, then summary judgment should be entered in accordance with such dominating fact situation.

To that effect also are the following additional authorities which in varying situations and conditions all sustain the principle stated.

See:

Trinity Universal Ins. Co. v. *Woody*, 47 Fed. Sup. 327,

where a breach of warranty by the insured was decisive of the entire situation and so was held to warrant a summary judgment.

Berry v. *S. P. & S. Ry. Co.*, 2 Fed. Rules Dec. 483,

where a written contract was construed to create a relation of *independent contractor* and thus require a summary judgment against recovery *as an employee.*

Sadler v. *Guardian Life Ins. Co.*, 40 Fed. Supp. 772,

where failure to notify the company of death by accident, failure to allow an autopsy and long delay in making claim were held to create defenses as a matter of law requiring the entry of a summary judgment for the company.

See also the recent case of *Vitozi* v. *Balboa Shipping Co.*, 69 Fed. Supp. 286, where motion for summary judgment by defendant, based upon affidavits in support thereof, was allowed where affidavits showed without dispute that the defendant who was sued, although owner of the vessel, had chartered it to an operating line, and hence was exonerated from accidents to a longshoreman working on the vessel. In the opinion it was said (p. 287):

> "Rule 56, Federal Rules Civil Procedure, 28 U. S. C. A. following section 723c, permits the court '* * * to pierce the allegations of fact in the pleadings * * *.' Moore's Federal Practice, Vol. 3, p. 3175."

B.

The Rule Contended for by Petitioner as to Withholding Judgment on an Admitted Liability, Until the Claim of the Opposing Party Is Determined, Has No Application. The Cases Cited by Petitioner Are Inapplicable and Distinguishable.

The case of *Crompton* v. *Seaich*, 142 App. Div. (N. Y.) 431, cited by petitioner, is no authority to support his position or to upset the judgments of the District Court in this cause. This is because of the dissimilarity in the fact situations which are involved. In the first place the New York

court provisions are different from the provisions of the Federal Rules of Civil Procedure. Moreover, the claims in that case were distinct and different. Plaintiff sued for the value of services rendered and the counterclaims were, as the opinion sets forth, "upon contract but in no way connected with the subject matter of the plaintiff's claims", being upon a note and for money loaned.

In our case, there was a complete interrelation of the plaintiff's claim and the defendant's counterclaim. This New York case is largely typical of all of the cases cited by plaintiff upon this point and fails completely to meet the situation already referred to herein, that where some factual situation determinative of the legal rights of the parties, is shown to exist by clear and indubitable facts or by admissions, a summary judgment is proper in accordance with the legal effect of such facts and the entire litigation terminated thereby.

In *Moore* v. *Wright*, 4 Ill. App. 443, also cited by petitioner, the claims and counterclaims arose out of different subject matters so that even though the plaintiff admitted liability to defendant on the counterclaim this did not dispose of the whole litigation. Under the circumstances it was natural that the Court should have said what it did with reference to the defendant being entitled to judgment on the counterclaim in the event that the plaintiff failed to show a right of recovery upon his alleged cause of action. The case is so utterly different from the one now under consideration by this court that neither the decision nor the language of the Court are of value at this time.

Abraham v. *Selig*, 29 Fed. Supp. 52, merely held that a motion to dismiss a claim should be denied, because under Rule 13 (c), it was of a character which the Rules of Civil Procedure recognized as proper.

Burgess v. *Slaven*, 266 N. Y. Supp. 79-81, which is not

quoted from but is cited as in support of the decision in *Crompton* v. *Seaich,* was another case where an original claim and the counterclaim were dissimilar and bore no relation to each other. The principal decision, accordingly, was that final judgment on the counterclaim should be withheld until results of the original claim should be determined.

Parmelee v. *Chicago Eye Shield Company,* 157 Fed. (2d) 582, is distinguishable upon the ground that there were in that case genuine issues to be tried in view of the fact that, while the plaintiff sued for goods sold and delivered and asked for summary judgment upon the defendant's admission that defendant was indebted to plaintiff for such goods, the counterclaim related to other matters as to which there necessarily would be a trial. The particular point of the decision was that judgments were not to be entered piecemeal, but action upon the defendant's admission should be taken when the issues upon the counterclaim should be decided.

It will be seen that the cases cited by petitioner are beside the point and have no relation to the fact and legal situations which are involved in the case at bar.

In the argument in support of the petition for certiorari much is made of the contention that defendant's counterclaim, upon which judgment for $2,400 was entered, had to do with items occurring after September 1, 1940, whereas plaintiff's claim was an attempt to surcharge all of the items during the five-year period preceding September 1, 1940 with an additional 10% commission. This argument ignores the essential nature of the situation, for, beginning with the origin of the agency relation, an account was established between the parties covering the various aspects of the insurance business done by plaintiff on behalf of defendant. This has been clearly identified as a continu-

ous, running, mutual account. The record shows that even though the principal agency was terminated September 1, 1940 a more limited and restricted agency continued thereafter (see Par. 4 of amended complaint, R. 4, and also Par. 1 of plaintiff's reply to defendant's counterclaim, R. 17) and that items of debit and credit arising out of such later transactions appeared in the account which represented the relationship between the parties.

There is no dispute that as late as September 30, 1942, more than two years after the termination of the principal agency, plaintiff was indebted to defendant in excess of $6,000 upon the account which represented their business relationship. There was no division of the account as of September 1, 1940. Obviously, transactions going back for a considerable period of time must have been the occasion for the large debit balance of $6,000 owing from plaintiff to defendant as of September 30, 1942. While that debit balance had been reduced as of the date of the filing of defendant's counterclaim upon an account dated June 1, 1946, so that plaintiff's debt amounted at that time to but $2,654.72, it is obvious that the account related not only to items shown on Exhibit 1 to the counterclaim but to other transactions subsequent to September 1, 1940 and including the remainder of the balance of $6,000 due September 30, 1942. The fact that defendant's partially itemized statement of account dated June 1, 1946 included only distinguishable items of the account in no way overcame the fact that the final balance of $2,654.72 was the net result, as of that time, of all of the preceding transactions between the parties. It was clearly not a separate claim as to different transactions but was the concluding part of the whole series of transactions which, gathered into a final balance, was found by the District Court to constitute an account stated between the parties.

In the brief of petitioner (p. 18) it is stated that plaintiff's claim related to matters occurring prior to September 1, 1940 and not thereafter, which latter did not relate to the cause of action. Paragraph 4 of the amended complaint is referred to. An examination of that paragraph of the amended complaint shows that the averment was that plaintiff operated as defendant's agent until September 1, 1940 *"except that thereafter certain provisions of said contract remained and still remain in full force and effect"* (Par. 4; R. 4).

All this clearly shows the continuity of the account representing the relations between the parties and speaks as of the date on which the plaintiff swore to that amended complaint and of the date on which it was filed, both being July 20, 1944.

It is further stated in the brief of petitioner (p. 18) that the reply to the counterclaim denied that the transactions after September 1, 1940 involved the same matters that were covered by the complaint up to that date, and that the reply specifically stated that the matters prior to September 1, 1940 involved different transactions from the ones thereafter, and admitted the correctness of the account for the period not covered by the complaint. This is a perversion of the language of the reply, for the denial that is contained in paragraph 1 thereof is merely that after September 3, 1940 plaintiff represented defendant only as to inland marine and automobile insurance, but states affirmatively that after September 3, 1940 "the plaintiff retained a large number of Class 2 agents, on whose policies plaintiff was paid an over-riding commission of 10% *as theretofore"* (Par. 1; R. 17). This paragraph also stated "that such policies covered all lines of insurance carried by defendant, and all policies so written were cleared through the office of plaintiff" (Par. 1; R. 18).

It was also stated in the brief of petitioner that plaintiff's claim was based on concealment of material facts and fraud; that plaintiff based his complaint on fraud, and that he sued for 10% for the items covered for these transactions, excluding the subsequent items. This is a misstatement of the basis of plaintiff's claim which was not based upon fraud but was based on the written contract of October 22, 1937. If plaintiff's action had been based on fraud it would have been in the nature of an action of deceit, but the essential averments necessary for such an action were not stated in the complaint. The averments of fraud, as will be seen on an examination of them, were solely for the purpose of meeting the anticipated defense of the statute of limitations, since the averment is that the supposed fact that other agents were receiving 10% more commission than plaintiff first became known to plaintiff about June 1, 1943 and that plaintiff's suit was brought within five years from the date when knowledge of the existence of plaintiff's supposed claim came to plaintiff.

C.

Under Rule 13(a) Defendant's Counterclaim Was Compulsory, Not Permissive, Because Arising Out of the Transaction or Occurrence Which Is the Subject Matter of Plaintiff's Claim. In That Situation the Judgment Entered Necessarily Disposed of Both Plaintiff's Claim and Defendant's Counterclaim, Such Being the Purpose of Rule 13(a).

It seems clear from the record in this case that defendant's counterclaim was a compulsory one under Rule 13(a) because it arose out of the transaction or occurrence that was the subject matter of the plaintiff's claim that is the contract of October 22, 1937, and could be adjudicated without the presence of third parties.

The fact that it was a compulsory counterclaim is strongly corroborative of our contention that there was such identity of the subject matter of both claim and counterclaim that plaintiff's admission of defendant's right to recover was not limited merely to a recovery under the counterclaim, but carried over into the plaintiff's own claim and destroyed it. While we do not contend that every compulsory counterclaim would necessarily destroy the rights of a plaintiff under his claim, yet it is obvious that that must be the situation in most cases and certainly is in this.

That this is a compulsory counterclaim is shown by the language of Rule 13(a), as follows:

> "(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

See also *Big Cola Corporation* v. *World Bottling Co.*, 134 Fed. (2d) 718, where it was said (at page 723):

> "The difference between the compulsory requirement of stating counterclaims under Rule 13(a) and the permissive provision of stating such claims under 13(b), depends on whether such claims arise 'out of the transaction or occurrence that is the subject matter of the opposing party's claim.' Where a counterclaim is an essentially independent action, it is a permissive counterclaim; and even where pleaded in answer to an opposing party's claim, the trial court is given discretion to order separate trials of claim and counterclaim. See Rules 13(i) and 42(b), Federal Rules of Civil Procedure."

See also *Lesnik* v. *Public Industrial Corporation,* 144 Fed. (2d) 968, where it was said (pp. 975, 976):

> "The compulsory counterclaim device is, of course, only a means of bringing all logically related claims into a single litigation, through the penalty of precluding the later assertion of omitted claims. See *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306; *Marconi Wireless Telegraph Co.* v. *National Electric Signaling Co.,* D. C. E. D. N. Y., 206 F. 295."

II.

The Decision of the Circuit Court of Appeals for the Seventh Circuit Is Not in Conflict Either With Other Decisions of That Court or With Decisions of Circuit Courts of Appeal for Other Circuits.

It is argued in petitioner's brief (pp. 19-21) that the decision of the Circuit Court of Appeals for the Seventh Circuit was in conflict with decisions of other Circuits and with Rule 15(b) and the case of *Globe Liquor Company* v. *Roman,* 160 Fed. (2d) 800, was cited as authority.

With reference to Rule 15(b) it will be seen that it deals only with amendments to conform to the evidence where a case is tried either before a court or before a jury, and issues which are not raised by the pleadings are nevertheless tried in the case either by express or implied consent by the parties. Such a situation has nothing to do with the question involved in this case so that there is no occasion to treat the record made in the case at bar as if there had been a trial upon issues which had not been raised by the pleadings. It was not necessary to amend the pleadings in that respect nor does the failure to amend invoke Rule 15(b).

It cannot be now assumed that defendant upon the trial would have permitted without objection admission of evidence of facts not in issue under the pleadings.

Moreover, no effort was made in this case to amend the pleadings. And even if they had been amended to the extent of putting into the amended complaint the missing averment that the defendant promised to pay plaintiff as much as was paid to any other similar agent, such an averment would have been inconsistent with the written contract and would have availed plaintiff nothing, because any issue as to the nature of the contract was submerged by the admissions by plaintiff that the net result of a continuous, running, mutual account covering transactions between the parties arising under the contract had resulted in the plaintiff becoming a debtor to defendant in the amount of $2,400 which would preclude defendant being indebted to plaintiff in any amount.

Globe Liquor Company v. *Roman*, 160 Fed. (2d) 800, cited in plaintiff's brief, is inapplicable because what was said in that case related to a case which was tried before a jury, and the language quoted from the decision not only cited Rule 15(b) but showed that it was a case to which that Rule had application.

Rossitter v. *Vogel*, 134 Fed. (2d) 908-912, while a case of summary judgment, merely held that where facts appeared in affidavits upon a motion for summary judgment which would justify an amendment of the pleadings, such amendment should not be prevented by the entry of a final judgment. This is a far different thing from what plaintiff now contends in view of the fact that plaintiff in his case did not ask leave to amend but asks now to be considered in the same position as if he had asked leave to amend and had been denied.

Sprague v. *Vogt,* 150 Fed. (2d) 795, merely held that a reasonable surmise that the plaintiff is unlikely to prevail upon a trial is not sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous or so unsubstantial that it would obviously be futile to try them. In the case at bar the dominant position of the question of the account stated overrode all other issues which might have been important were it not for the existence of the account stated.

Petitioner makes the naive argument (p. 19 of petitioner's brief) that a lawyer who carelessly made admissions in the pleadings which he would not have made if he had been more careful should, nevertheless, have the advantage of an affidavit correcting the admissions even though no effort were made to amend the pleadings. It is argued that the affidavit should be given the same effect as if it had been a pleading.

Ramsouer v. *Midland Valley Railway Company,* 135 Fed. (2d) 101-105, is cited as if supporting that proposition. But all that that case held was the standard principle that the question to be tried on a motion for summary judgment is whether or not there is a genuine issue as to any material fact and not how that issue should be determined. That case also held, as do most of the cases, that the situation is the same as on a motion for a directed verdict where the evidence is taken most favorably for the party against whom the motion is directed, giving him the benefit of all favorable inferences that may reasonably be drawn, and where a reasonable man could reach different conclusions the motion should be denied and the case tried on the merits.

This does not apply here because, on this record, the predominant effect of the admission by plaintiff is that

he was indebted to defendant upon the same account and under the same contract and with respect to the same general course of transactions as those out of which plaintiff's claim arose.

Parmelee v. *Chicago Eyeshield Company*, 157 Fed. (2d) 582, also cited in petitioner's brief, has already been shown in an earlier portion of this brief to be inapplicable.

We respectfully submit that there is no such diversity of decision in the various circuits as to require this Court to clarify the situation and determine what rule is to be followed. In addition, as already stated, the question is now essentially a moot one since the approved amendment to Rule 12(c) makes it clear that if on a motion for judgment on the pleadings matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

III.

A.

The Rule That a Motion For Judgment on the Pleadings Admits the Allegations of the Complaint, Regardless of the Allegations of the Answer, Has No Application here because:

(1) There Are Other Pleadings Containing Admissions of Fact Which are Vital and Dominating to a Decision of the Case; and

(2) By Reason of Such Pleadings and Admissions Other Allegations of the Complaint Are Rendered Immaterial.

The cases cited by us under the preceding heading I-A support the foregoing proposition and will not be repeated but are referred to as authorities supporting the above.

B.

The Cases Cited by Petitioner Are Clearly Distinguishable.

Moreover, the cases cited in support of Point III do not, when analyzed, sustain the proposition stated. In general, it will be seen that they are cases where the motion is merely for judgment on the pleadings for failure to state a case, that is, are essentially to dismiss for such failure.

In the case at bar the motion for judgment on the pleadings is upon *all the pleadings* and particularly upon the counterclaim and the admissions in the reply thereto.

Art Metal Construction Co. v. *Lehigh Structural Steel Co.*, 116 Fed. (2d) 57, merely held that in considering defendant's motion for judgments upon the pleadings, facts alleged by the plaintiff must be taken to be true and the inquiry should be whether upon those facts plaintiff has stated a cause of action. This is different from the situation in the case at bar in that our motions were based on all of the pleadings and sought a definitive judgment, not merely dismissal.

Moreover, since defendant's motion was in the alternative and the court could have acted on a motion for judgment upon the pleadings under Rule 12(c), or upon a motion for summary judgment under Rule 56, the case cited and the principle for which it stands are beside the point.

Friedman v. *Washburn Co.*, 145 Fed. (2d) 715, was decided essentially upon the ground that there were sufficient allegations in the complaint (if proved) to sustain an action for a wrongful disregard of confidential relations even if insufficient to show the defendant to be a trustee *ex maleficio* of a patent.

Attention is called to the language quoted in this opin-

ion from 1 Moore's Federal Practice, Sec. 12.05, where, among other things, it is said that a motion for judgment on the pleadings must be sustained by undisputed facts appearing in "*all* the pleadings".

Wyman v. *Wyman,* 109 Fed. (2d) 473, involved a judgment on the pleadings under Rule 12(c). The action was to recover alimony allowed in a New York proceeding. In an action brought in Nevada where the defendant had himself procured a decree of divorce, the opinion showed that there were disputed issues under the pleadings which were not overborne by other undisputed facts.

In *Ream* v. *Callahan,* 42 Fed. Supp. 951, the motion was for a judgment dismissing the action on the pleadings because the complaint failed to state a claim upon which relief could be granted. The court said that the sole question presented was whether the complaint stated facts sufficient to constitute a cause of action.

In *Snowwhite* v. *Tidewater Oil Co.,* 40 Fed. Supp. 739, on a motion asserting as a defense the failure of plaintiff to state a claim for relief and on a motion for judgment on the pleadings, it was held that the court should not consider affidavits or other evidence to sustain the motion and it was pointed out that a litigant desiring to attack another litigant's right to recover by offering proof could move for summary judgment. The situation in the case cited is different from the case at bar.

Even if there should be applied a rule that a motion for judgment on the pleadings makes admissions of facts averred in the pleadings attacked, this is of no help to petitioner in the case at bar since facts thus admitted and which might raise an issue by reason of denials in defendants' answer, give way to the principle set forth in the cases cited under heading I-A of our brief.

C.

Moreover, Plaintiff Failed to State a Cause of Action in the Amended Complaint Through the Lack of Any Allegation That Defendant Contracted to Pay Plaintiff as Much as It Paid to Other Similar Agents.

The instant case was rightly decided by the District Court favorably to the defendant upon the ground, if no other had existed, that plaintiff had failed to state a cause of action. That result would follow from the failure of the plaintiff to set forth an agreement between the parties that defendant had promised plaintiff to pay plaintiff as much as defendant paid to other similar agents. As already pointed out *there is no such allegation in the amended complaint* and the reiteration by plaintiff in his brief of the statement that the complaint was based upon such a theory is wholly without foundation.

IV.

A.

There Were No Genuine Issues of Fact Remaining to Be Tried When Plaintiff Admitted Being the Debtor to Defendant Upon an Account Covering Transactions Between them, and Such Transactions and the Admissions Relating Thereto Were Determinative of the Entire Situation.

We respectfully submit that the foregoing proposition is completely substantiated by the authorities set out under the heading I-A of this brief as applied to the facts herein set forth.

In various texts and cases dealing with the questions which are involved in the case at bar there has been used

an expression, namely "piercing the pleadings", which is applicable here. What is meant, of course, is that regardless of issues upon incidental and collateral matters, if the court sees clearly on the entire situation and upon all of the material submitted, whether upon a motion for judgment on the pleadings or for summary judgment, that there is some outstanding fact determinative of the rights of the parties and undisputed upon the presentation to the court, then the court should cut through all such immaterial matters to the heart of the situation and give judgment accordingly.

B.

The Cases Cited by Petitioner Are Clearly Distinguishable.

Campana v. *Harrison*, 135 Fed. (2d) 334, does not hold anything contrary to our contention. We are not seeking to try this case on opposing or conflicting affidavits. What the District Court did in our case was to consider all of the facts, both in the pleadings and in the affidavits of the parties, and by taking undisputed, determinative, factual situations, reached a conclusion which was inevitable as the case was presented.

To hold that the mere presence of any disputed issue of fact, no matter how incidental or collateral it might be in the light of the essential facts of the case, would preclude a summary judgment, would be to destroy completely the significance and meaning of the cases which we have cited herein under the head I-A and have discussed more fully under that head of this argument.

Sartor v. *Arkansas Natural Gas Co.*, 321 U. S. 620, 88 L. Ed. 967, does not go to the extent claimed. In that case it was pointed out that Rule 56(c) excluded the question of damages in determining whether the pleadings, depositions and admissions on file, together with affidavits, showed

there was no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law. That case held that the existence of a cause of action depended on the existence of damages. That being the case, it was improper to enter a summary judgment where the existence or non-existence of damages turned upon opposing affidavits of the contesting parties.

Parmalee v. *Chicago Eye Shield Company,* 157 Fed. (2d) 582, has already been referred to as a case where one of the parties, having utilized Rule 13 to file a counterclaim arising out of a totally different transaction, was not precluded from pursuing that claim merely because he admitted liability as to the counterclaim of the other party.

McElwain v. *Wickwire Spencer Steel Co.,* 126 Fed. (2d) 210, was an action by an employee to recover for disability from occupational disease where a summary judgment for the defendant was entered upon affidavits supporting the motion and opposed by counter affidavits filed by the plaintiff. These affidavits dealt with questions whether plaintiff's duties exposed him to dust and the danger of silicosis; whether plaintiff's condition developed prior to the effective date of the New York statute giving remedy for such an occupational injury, and a question of constitutionality. It was held that where there is a substantial dispute as to a material fact it cannot be said that the only issue is one of law. Obviously, the case is not an authority applicable to the present situation.

Miller v. *Miller,* 122 Fed. (2d) 212, was a case where suit was brought to recover unpaid installments of alimony under a Nevada divorce decree. On complaint, answer, deposition of the defendant and affidavits, the District Court granted summary judgment for the amount of alimony arrears and the defendant appealed. The question of the amount due plaintiff turned on the question of her

remarriage and there was a vigorous dispute between the parties by way of depositions and affidavits as to this factual question. That being the case, it was held beyond the purpose of Rule 56 and the summary judgment was reversed. Obviously, the case has no relation to the present situation.

Doehler Metal Furniture Co. v. *United States,* 149 Fed. (2d) 130, was a suit to recover for furniture sold under a contract with the army where the Government claimed for damages resulting from delays in delivery, and for the excess cost of goods obtained to replace those not delivered. Both plaintiff and defendant moved for summary judgment. Plaintiff's motion was denied, its complaint dismissed, and judgment was entered in favor of the defendant. The judgment was reversed because of the uncertainties arising on the case as presented to the District Court without a trial as to the proper amount of damages. The case thus seems to be clearly distinguishable from our case now under consideration and followed the decision of *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U. S. 620; 88 L. Ed. 967, already referred to, that a summary disposition of issues of damages should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party. The case is no authority against the action taken by the District Court in this case.

Following the cases which we have just analyzed and shown to have no bearing or application upon the present situation, petitioner in his brief (p. 25) has again referred to the contention that his claim related to items prior to September 1, 1940 while the defendant's counterclaim related to subsequent items. This contention we have already referred to and answered by showing that all of the transactions both prior and subsequent to that date

gave rise to items upon the continuous, running, mutual account upon which plaintiff was admittedly the debtor. All of the items in question, whether before or after September 1, 1940, had their origin in the written contract of October 22, 1937 upon which plaintiff founded his suit. There is then an identity of contract and an identity of account with respect to all such items.

The statements contained in plaintiff's counter-affidavit with respect to the real estate which he said he conveyed as security for his debt to the defendant have nothing whatever to do with this litigation except so far as they are corroborative of the fact that over a long period of time plaintiff was indebted to defendant for premiums collected and not remitted and which were part of the account between the parties.

It is further argued in petitioner's brief (p. 27) that there were certain genuine issues of fact appearing in the record, and five such are particularly stated. We shall consider these in their order:

1. The issue whether plaintiff was the general agent of the defendant as alleged in the complaint and denied in the answer was a wholly immaterial issue in view of the dominating situation arising out of the account stated. This account stated arose out of an agency relationship, but whether as a general agent or otherwise became wholly immaterial, so long as the account stated existed.

2. The issue as to whether plaintiff was an ordinary agent as set up in the answer is simply the counterpart of the last preceding point and is wholly immaterial.

3. There was no issue as to whether plaintiff and defendant had agreed that plaintiff should receive the same rate as was being paid to other similar agents. We have already pointed out that there was no such allegation in

the complaint with respect to the contract of October 22, 1937 upon which this suit was brought. The fact that plaintiff alleged in his complaint that there was such a term in the alleged preceding written agreement and the fact that defendant denied the existence of such an agreement or of the inclusion therein of such a term, could not create an issue as to whether such a term was in the agreement sued on. Moreover it was immaterial in view of the other facts. Plaintiff's repetition of the statement that the complaint contained such an allegation is clearly indicative of the fact that the wrong statement in question was not made through inadvertence but apparently has been deliberately made and repeated without regard to the truth of the situation.

4. This point might have given rise to an issue of fact upon an unimportant matter, but it is at all events not truly stated in plaintiff's brief. The answer is not silent as to the allegation of the complaint that other agents received higher rates of commission. We have already pointed out that the allegation to that effect (Par. 7; R. 4) was definitely denied by defendant (Par. 7; R. 10). There is, therefore, no admission under the Rules of Civil Procedure, as contended, and while there is an issue of fact it is one which is wholly immaterial for several reasons, one being that without an allegation in the complaint that plaintiff should receive as much commission as any other agent, the allegation that other agents received higher commissions would have no bearing. And another reason is that there being an account stated between the parties having to do with the transactions arising out of the same contract and appearing in the same account, makes any such issue wholly immaterial.

5. Nor is there a genuine issue as to whether the payments were made upon the account stated as set out by

the defendant or upon some supposed account agreed upon, before plaintiff discovered that he had due him over $12,000 in additional commissions. There was only one account between the parties and this was continuous. The portion which was set up by defendant in its counterclaim was merely the latter part of such continuous account. There is nowhere any suggestion that there were two accounts between the parties. Not only did plaintiff in his complaint set out that the indebtedness claimed and for which the suit was brought "constituted part of a mutual account between the parties hereto" (R. 19), but also necessarily there could be but one account since plaintiff's claim was for an additional 10% of commissions out of the premiums collected by him as an agent for the defendant during the course of the account.

Accordingly, it is clear that there were no genuine issues of fact involved and it was, therefore, proper to enter judgments in favor of the defendant. And upon the whole record it is clear that plaintiff had not stated a claim in his original complaint and that any claim which might presumably have been stated therein was so intermingled with the defendant's counterclaim, upon which plaintiff admitted liability, that defendant was entitled to the judgments which were entered.

V.

When a Motion for Judgment on the Pleadings and a Motion for Summary Judgment Are Presented at the Same Time and Both Motions Seek a Single Relief for the Same Party, They Can Be Granted Justifiably in Reliance Upon Any or All Appropriate Grounds Disclosed by Any or All of the Papers of Record in the Case.

In the closing part of petitioner's brief (pp. 28-29) it is argued that Rules 12(c) and 56 are mutually exclusive and a judgment cannot be entered under both rules. As the Circuit Court of Appeals pointed out there was but one judgment.

Petitioner admits in his brief (p. 28) that it is proper to ask for a judgment in the alternative under Rule 12(c) and also under Rule 56, so that the course taken by defendant is not claimed to be erroneous. What petitioner finds fault with, however, is the action of the court which petitioner charges to be improper because it is assumed the judgments were entered on both motions. As we have pointed out, the court entered judgments on the record, and while such action was brought about by defendant's alternative motions, the court without choosing between the motions entered judgments appropriate to the situation.

The argument (pp. 28-29) that petitioner was entitled to have the District Court say on which motion it acted is wholly untenable. It is not what a trial court says is the reason for decision that is determinative but whether its judgment is right. A court may even give a wrong reason for a right decision and the decision will stand. Here the District Court while not stating which motion was allowed did give its grounds of decision, for

it made a finding that "the plaintiff has admitted that there is now owing and due from the plaintiff to the defendant the sum of" $2,400.00 "under the same contract, and upon the same account and with respect to the same transactions upon which plaintiff seeks to recover under his amended complaint; that said sum is due from plaintiff to defendant upon an account stated between the parties" (R. 28).

The law is contrary to petitioner's contention. In *Palmer* v. *Palmer*, 31 Fed. Supp. 861, Circuit Judge Clark, acting as District Judge pursuant to statutory designation, passed upon a similar situation when he said (at p. 863):

> "The present proceedings arise on defendants' motion for judgment on the pleadings and motion for summary judgment. These are presented as two separate motions, the former dealing only with issues of law on the pleadings and the latter only with whether there were any triable issues of fact in view of the affidavits filed. I see no occasion for treating them as thus distinct. Both motions seek a single relief, judgment for the defendants; in granting that relief I feel I am justified in relying on any or all appropriate grounds disclosed by any or all the papers of record in the case. *United States Trust Co. of New York* v. *Sears*, D. C. Conn., 29 Fed. Supp. 643, 645."

In *United States Trust Co. of New York* v. *Sears*, 29 Fed. Supp. 643, which was cited in the last preceding citation, and where the same Circuit Judge acted as District Judge pursuant to statutory designation, it was said (p. 645):

> "This action has been submitted for adjudication upon the pleadings and upon memoranda of the parties stating their claims of law. The pleadings consisted of a complaint and an amendment thereto by the plaintiffs, defendant's answers to both the complaint

and its amendment admitting all allegations of fact and stating two partial defenses and one complete defense, and plaintiffs' reply admitting the allegations of fact of these three defenses. The reply is not authorized, Rule 7(a), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, but the present proceeding is essentially one wherein all parties move for judgment on the facts shown of record and it is appropriate to consider admissions made by the parties, whether within or without the formal pleadings. Since, therefore, all statements of fact made on behalf of either the plaintiffs or the defendant stand admitted in the documents on file, no formal findings of fact by the court are required. Rule 52(a), F. R. C. P."

In 1 Moore's Federal Practice, Section 12.05, it is said:

"Strictly a motion for judgment on the pleadings must be sustained by the undisputed facts appearing in all the pleadings, supplemented by any facts of which the court will take judicial notice. But since Rule 56 authorizes a summary judgment, the court would be warranted in entering a judgment in the following situations: (1) When on the undisputed facts appearing from the pleadings one party is entitled to judgment as a matter of law; and (2) when it is made to appear from the pleadings, affidavits, or depositions that there is no substantial dispute as to certain facts which warrant a judgment for one party as a matter of law, although some of those facts may be an issue under the pleadings."

Applying the statement of the law above referred to, it is clear that in the case at bar judgment for the defendant on both plaintiff's claim and defendant's counterclaim were called for because there was "*no substantial dispute as to certain facts which warrant a judgment for one party as a matter of law*, although some of those facts may be an issue under the pleadings." Merely

because there were immaterial issues in this case as to whether plaintiff was a "general" agent or not; as to whether other agents were paid more than plaintiff; as to whether defendant "fraudulently" concealed from plaintiff the fact that other agents were receiving larger commissions, there was no ground for refusing to act on a factual situation which made those and similar issues of fact completely unimportant. There is present in the case at bar a situation where there is no substantial dispute that there was an account stated between plaintiff and defendant as to the insurance transactions between them, and because thereof the defendant was entitled to judgments on the record.

VI.

A.

A Suit May Be Instituted and Prosecuted Only by a Party Having Actual Legal Existence and Possessing Legal Capacity to Sue. A Deceased Person Does Not Have Such Legal Capacity.

See: 39 Am. Jur. p. 865-66, Sec. 12.
39 Am. Jur. p. 867, Sec. 14.

In *Marsteller* v. *M'Clean,* 11 U. S. (7 Cranch), 156, 159, it was said,

> "It seems, however, to be a settled rule that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported."

It is, of course, fundamental that a dead man cannot be a party plaintiff. Oscar Pofe died on September 21, 1947. The suit, consisting of the filing of this petition for certiorari, was begun the following day, September 22, 1947. Regardless of the shortness of the interval between

the time of death and the commencement of the suit, the fact remains that this proceeding was brought in the name of a man who was then dead. He might as well have been dead for days, weeks or months so far as the legal situation is concerned.

B.

The Petition for Certiorari in This Case Was Not "Pending" When the Petitioner, Oscar Pofe, Died. Accordingly, Rule 19, Par. 1 of This Court Does Not Apply.

Rule 19, Par. 1, reads in part as follows:

> "Whenever, pending an appeal for writ of certiorari in this court, either party shall die, the proper representative in the personalty or realty of the deceased, according to the nature of the case, may voluntarily come in and be admitted as a party to the suit, and thereupon the case shall be heard and determined as in other cases * * *"

It is obvious that this proceeding for writ of certiorari was not "pending * * * in this court" at the time of the death of Oscar Pofe on September 21, 1947, for the first action taken in this court was the filing of the petition for writ of certiorari on September 22, 1947.

In *Green* v. *Watkins*, 19 U. S. (6 Wheat.) 262, 5 L. Ed. 256, after holding that there is a material distinction between the death of parties before judgment and after judgment and while a writ of error is depending, and after further holding that in the former situation both personal actions and real actions abated, it was said:

> "But, in cases of writs of error upon judgments already rendered, a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that by the course of proceedings at common law, the writ abates; but if, after assignment of errors, it is otherwise. In this

latter case, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous; and he may then revive it against the representatives of the plaintiff."

It will be noted that in this case the specifications of errors relied on for reversal were filed as a part of the petition for writ of certiorari on September 22, 1947, after the death of the supposed petitioner.

C.

It Is Now Too Late to Commence a New Action by Petition for Writ of Certiorari in the Name of the Administrator or Executor of Oscar Pofe.

Under the Judicial Code Title 28 U. S. C. A. Sec. 350, it is provided in part as follows:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *"

The petition for re-hearing in the Circuit Court of Appeals for the Seventh Circuit was denied on June 30, 1947 (R. 63). The three months' period elapsed on September 30, 1947. Although counsel for plaintiff was advised by defendant's restricted acceptance of service of the notice of the filing of the petition for writ of certiorari, by the form of the acceptance of service, no effort appears yet to have been made to bring a new suit in the form of a petition for writ of certiorari in the name of Pofe's legal representative. As already pointed out in our objections to the jurisdiction of the court, when plaintiff's counsel served defendant's counsel on September 25, 1947,

with notice of the filing of the present petition for writ of certiorari, there was written into the acceptance notice the following language: "Without prejudice from the fact of death of petitioner, Oscar Pofe, prior to the filing of said petition."

By reason of the foregoing, it is urged that this court is without jurisdiction to grant the writ of certiorari sought and, moreover, that no case has been presented by the petition for that writ which warrants the court in granting it.

Respectfully submitted,

HAYES MCKINNEY,
Attorney for Respondent.

C. OSCAR CARLSON,
MCKINNEY, FOLONIE & CARLSON,
105 West Adams Street,
Chicago 3, Illinois.
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 361

OSCAR POFE,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

MOTION FOR LEAVE TO SUBSTITUTE EXECUTOR OF THE ESTATE OF OSCAR POFE, DECEASED, AS PETITIONER.

MEYER ABRAMS,
Attorney for Petitioner.

SHULMAN, SHULMAN AND ABRAMS,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.

Midwest Law Printing Co., 340 W. Huron St., Chicago

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MOTION FOR LEAVE TO SUBSTITUTE EXECUTOR OF THE ESTATE OF OSCAR POFE, DECEASED, AS PETITIONER.

Now comes John Rosko, Executor of the Estate of Oscar Pofe, Deceased, by Meyer Abrams, his attorney, and moves for leave to be substituted as petitioner for the Deceased, Oscar Pofe, as per suggestions attached.

MEYER ABRAMS,
Attorney for Petitioner.

AFFIDAVIT IN SUPPORT OF MOTION.

State of Illinois }
County of Cook } ss.

Meyer Abrams, being first duly sworn, on oath deposes and says that he is the attorney for the Petitioner, and for the Executor of the Estate in connection with the foregoing Petition.

Affiant further says that he mailed the Petition and Record, together with the filing fees, to the Clerk of the Court on September 17, 1947, during the lifetime of the deceased, but due to the fact that the office of the Clerk was closed on Sunday, September 21, 1947, it was not docketed until the following day, and during the interval Petitioner departed his life testate; that John Rosko is the Executor of the Estate and that Letters Testamentary were duly issued to him, as it more fully appears from the Letters which are filed together with this affidavit.

Affiant further says that he filed a notice for the designation of the record in connection with the petition on July 11, 1947 (R. 64), but that he was requested by the attorney for the respondent, Hayes McKinney, to delay the filing of the petition until the last few days of the expiration date, due to the fact that he was leaving on his vacation and he wanted to have the opportunity to file the answer upon his return, and for this reason affiant did not forward the petition for filing until September 17, 1947.

Affiant further says that on July 11, 1947, during the lifetime of the Petitioner, he moved in the Court of Appeals to recall the mandate and to stay the mandate pending the filing and disposition of the Petition for Writ of

Certiorari and that the court recalled the mandate on that day, and stayed the mandate pending the disposition of the petition for the issuance of the writ of certiorari.

And further affiant sayeth not.

MEYER ABRAMS.

Subscribed and sworn to before me this 1st day of November, 1947.

NAOMI KAPLAN,
Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 361

OSCAR POFE,

Petitioner,

VS.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK,

Respondent.

SUGGESTIONS IN SUPPORT OF MOTION TO SUBSTITUTE EXECUTOR OF THE ESTATE FOR THE PETITIONER.

A STATEMENT OF FACTS.

The appeal to the United States Circuit Court of Appeals for the Seventh Circuit operated as a supersedeas, the Petitioner having given his Supersedeas Bond (R. 39). On July 11, 1947 the mandate was recalled and stayed pending the filing and disposition of the Petition for Writ of Certiorari (See Affidavit). The designation for the contents of the record in connection with the Petition for

Writ of Certiorari was filed on July 11, 1947 (R. 64). The record was certified by the Clerk on July 17, 1947 (R. 65). Respondent's attorney requested counsel for the petitioner not to file the petition until shortly prior to the expiration date because of his desire to leave on vacation and to have the opportunity to file his answer after his return and for this reason, the petition was not forwarded to the Clerk for filing until September 17, 1947 (See Affidavit).

The Petition was actually deposited in the post office on the 17th day of September, 1947 while the Petitioner was alive. It should be assumed that it reached the office of the Clerk early Sunday morning. The Petitioner died on that day and due to the fact that the Clerk's office was closed on Sunday, it was not docketed until the following day, September 22, 1947. The deceased's Executor was appointed October 29, 1947 and he now moves for leave to be substituted as the Petitioner in lieu of the deceased.

I.

The petition was mailed for filing during the life of the petitioner and his death did not affect the jurisdiction of this Court for the substitution of his executor in lieu of the deceased.

The motion for leave to substitute the executor of the Estate of the Deceased as Petitioner should be allowed under Rule 19 of this court, Rule 25 of the Rules of Civil Procedure, and under the Statute, 28 U. S. C. A., Section 778, as construed in *Myer* v. *Canton National Bank,* 109 F. (2) 31, 34; See also Moore's Federal Practice, 1946 Supp., page 34 construing Rule 25 of the Rules of Federal Procedure.

II.

The judgment did not become final until the expiration of two years from the date of the death of the petitioner and the motion to substitute the executor should be allowed.

The Petition was filed within the 90-day period. The fact that between the date of the mailing of the Petition and the date of the filing the Petitioner departed his life, does not affect it as the cause is still considered *pending*. The question when an action is pending is *governed by State law* (*Re*: *Cannaway*, 178 U. S. 421). A judgment on appeal which operates as a supersedeas does *not* become *final* under the Illinois law until the disposition of the Writ of Certiorari or a petition for leave to appeal which now takes the place of the Writ of Certiorari (Smith Hurd's Ill. Revised Statutes, Chapter 110, Section 199). The point raised by the respondent that the Petition for Writ of Certiorari operates as a *new* suit is *not* supported by any authorities, and the authorities on which respondent relies (pp. 44, 45) *apply to writs of error* which are *distinguishable* from *appeals*, the former being the commencement of a *new* suit, while the latter operates as a *continuance* of the original suit. (*Soden* v. *Claney*, 269 Ill. 98; *Unbehahn* v. *Fader*, 319 Ill. 250, 254; *Minneapolis & R. Co.* v. *Rock*, 279 U. S. 410). The respondent who is responsible for the filing of the Petition shortly prior to the date of the death of the petitioner as shown in the affidavit, should not be allowed to take advantage of this unfortunate situation.

For the foregoing reasons, we submit that the motion for leave to substitute the executor of the Estate of the Deceased as the Petitioner in this case should be allowed.

REPLY TO RESPONDENT'S ANSWER.

Respondent's statement of the matter involved is misleading and inaccurate.

In stating the allegations of the Complaint, respondent says (p. 3) that *"there is no averment in the Complaint that the substituted agreement of October* 22, 1937 *contained a provision that the defendant should pay plaintiff at the same rate of commission as to other agents"* and that *"an examination of that contract shows that no such term or provision is contained therein"*. In the next breath, respondent quotes from the substituted agreement "in relation to the commissions" that the commissions shall be at rates "as *now* or may be in the future mutually agreed upon". This *refutes* the statement that there is no allegation in the Complaint that the "rate" in the substituted agreement was the same as in the original agreement. The Complaint did *not* allege that the agreement of October 22, 1937 was a *substituted* agreement but on the contrary, it alleged (R. 3; par. 3) that the original agreement was *"modified"*, and that agreement was made a part of the Complaint as Exhibit "A", and this agreement *specifically* states in paragraph 1 (R. 6) that insofar as the commissions are concerned the *"rates"* are as *"now"* or may be in the future mutually agreed upon. *The existing rate is alleged* in the Complaint whereby it was agreed (R. 3; par. 2) *"to pay the plaintiff for his services rendered pursuant to the terms of said contract commissions at the same rate at which defendant was paying its other general agents at the same time for like services."* There was no allegation that this rate agreement was changed by any different arrangement, but on the contrary, it was alleged in paragraph 4 (R. 4) *that the defendant operated under that agreement until September* 1, 1940. It is evident, therefore, that the statement

in italics (pp. 3-4) that there is no allegation that the defendant should pay plaintiff at the same rate of commission as to other general agents, is completely a *distortion* of the complaint as alleged, particularly in view of the duty of the court *to consider the allegations in the most favorable light to the petitioner on* the motion for summary judgment. Respondent italicizes the words "rescinded all prior agreements" (p. 4) but in the same breath after quoting that part of the agreement that it supersedes all previous agreements, he also quotes the *exceptions* as to the "rate" of commissions which was *not superseded* but which was as it *then existed* or as it may be agreed upon in the future, so that this part of the agreement was *not rescinded.*

I.

A. None of the authorities cited under this point have any bearing on the questions involved in the Petition. These authorities stand for the proposition that where there is no genuine issue of fact the court may enter a summary judgment. Here, there is a genuine issue of fact, as shown in the Petition. The question whether the plaintiff and defendant ever entered into the agreement by the terms of which the defendant was to pay the plaintiff commissions at the same rate it was paying other general agents and whether the defendant paid the other agents 10% more than he paid the Petitioner and whether such facts were fraudulently concealed from the Petitioner are questions which were alleged in the Complaint, denied or evaded in the Answer, and *are questions of facts* which could not have been disposed of by the summary judgment.

B. We deem it unnecessary to reply to the argument under this point (pp. 21-24) in which respondent attempts

in vain to distinguish the cases, when there is no real distinction, and ***not a single case was cited in support of respondent's position.*** The statement (p. 25) that the claim of the petitioner involved matters that occurred subsequent to September, 1940 is ***refuted*** by the allegation in the Complaint in paragraph 4 (R. 4) which limits the claim to services performed "until September 1, 1940" and it specifically states in the same paragraphs that there was *excepted* therefrom services performed as to other provisions of the contract which remained in full force and effect, and the suit was not brought thereon.

C. The argument under C does not require a reply for the reason that it is founded on the *false* theory that the matters which arose subsequent to September 1, 1940 are the same transactions that were had prior to that date, and we have already shown that these were distinct matters, and the counterclaim was *not* compulsory. (*Measurment Corp.* v. *Ferris*, 10 F. R. S. 13a 11-4 decided February 18, 1947 C. C. A. 3).

II.

The conflict in the decisions of the various circuits were fully discussed in the Petition, and there is nothing in the argument of the respondent to show that they are in harmony.

III.

A. The argument under this point consists of a few lines, barren of argument or authorities, and, therefore, no reply is necessary.

B. The attempt to distinguish the authorities cited by the Petitioner (pp. 32, 33) are devoid of merit and no

reply is necessary. We desire to call attention to Rule 54(6) which provides that no judgment shall be entered unless there is a determination of the "claim" and "counterclaim".

C. The argument that the Complaint did not allege that the respondent agreed to pay the plaintiff as much as it paid to other similar agents has been shown above to be baseless.

IV.

A. The argument under this point that there was no genuine issue of fact remaining to be tried deserves no reply and we will merely refer to the Petition on this point.

B. The cases cited by Petitioner are not distinguishable and the *alleged* distinctions of the respondent (pp. 35, 40) are *without merit*.

V.

We consider it a burden upon this Court to reply to the argument under this point (pp. 41-44) and we will, therefore, not reply.

VI.

The argument under this point (pp. 44-47) needs no further reply except that which we have pointed out in the Motion for leave to substitute under Points I and II *supra*.

For the foregoing reasons, we urge that the Writ of Certiorari be granted.

Respectfully submitted,

MEYER ABRAMS,
Attorney for Petitioner.

SHULMAN, SHULMAN AND ABRAMS,
134 N. LaSalle St.,
Chicago, Illinois,
Of Counsel.